Bukit Tinggi Hospital Sdn Bhd & Anor v Navin Sharma a/l Karam Chand (suing as administrator of the estate of Suman Rampal a/p Hardyal Rampal, deceased) & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(NCvC)(W)-1482–09 OF 2023 AND B-02(NCvC)(W)-1483–09 OF 2023

NANTHA BALAN, AZIMAH OMAR AND AHMAD KAMAL JJCA

23 SEPTEMBER 2025

Damages (personal injury or death) — Appeal — Appeal against trial court's awards — Whether claim for loss of support (dependency) under s 7(3) of the Civil Law Act 1956 must be proven by clear, convincing and compelling evidence — Whether court could not be asked to award a fair and reasonable amount for loss of dependency based on assumption, presumption or inference — Whether monies deceased might have kept aside for future needs of family could not be taken into account in assessing loss of support — Whether the multiplicand in a loss-of-support claim must be the actual and immediate monetary loss the dependents had suffered as a result of the deceased's death — Circumstances when estate of deceased in medical negligence cases could claim for aggravated damages against persons who caused the death

The appellants in Appeal 1482 were found liable by the High Court in a medical negligence suit brought against them by the respondents for causing the death of a 41-year-old woman ('the deceased') who was the first respondent's wife and the second respondent's sister. The trial court proceeded to award the respondents RM1,083,235.62 by of special, general and aggravated damages, statutory payment for bereavement and costs. The special damages were made up of RM49,601.50 for hospital and medical charges, RM15,000 for funeral and memorial service expenses, RM10,000 for the cost of obtaining medical records and RM12,354.12 for obtaining letters of administration ('LA') to the deceased's estate. The court further awarded the respondents RM100,000 for pain and suffering and loss of amenities of life, RM700,000 as aggravated damages, RM10,000 for bereavement and RM176,280 for loss of support calculated at the rate of RM2,260 per month for six and a half years pursuant to s 7 of the Civil Law Act 1956. The appeals herein by both parties were only with regard to quantum. By consent of the parties, the award for hospital and medical charges was reduced to RM33,000, the amounts awarded for funeral and memorial services, for obtaining the LA and for bereavement were maintained whilst the RM10,000 awarded for obtaining medical records via pre-action discovery was set aside. The court

proceeded to hear arguments on the trial court's awards for pain and suffering and loss of amenities of life (RM100,000), aggravated damages (RM700,000), loss of support (dependency) (RM176,280) and trial costs (RM10,000). The trial court's reason for awarding the substantial sum for aggravated damages was based on its finding that the appellants in Appeal 1482 had behaved unprofessionally in: (a) attempting to show that the deceased and her husband were contributorily negligent in discharging her from the appellant hospital against medical advice on her earlier visit there (which allegation was never proven at trial); and in (b) attempting to blame another specialist at the appellant hospital for the deceased's death. The appellants argued that the deceased's estate could not claim for aggravated damages as that was a claim that was personal to a 'living plaintiff'.

Held, unanimously reducing the award for pain and suffering and loss of amenities of life to RM50,000, setting aside the awards for loss of support and for aggravated damages and increasing the trial costs award to RM75,000:

(1) The appellants in Appeal 1482 argued that RM25,000 was a sufficient award for pain and suffering and loss of amenities as the deceased had suffered pain for only about 24 hours before her death. The respondents, however, were prepared to accept a reduced figure of RM75,000 arguing that although the duration of pain and suffering was only for about 24 hours, the pain suffered by the deceased during that period was tremendous because of three invasive procedures that were carried out on her person. Considering all the circumstances, the court was of the view that a sum of RM50,000 was a fair and reasonable award for this head of damages (see paras 25–26 & 29).

(2) Since there was no evidence that the deceased had actually contributed RM2,260 per month towards the household expenses, the trial court's award of RM176,280 for loss of dependency had to be set aside. Loss of dependency was akin to a special damage claim and had to be proven by clear, convincing and compelling evidence to establish that the deceased had in fact contributed a certain sum towards the household expenses. The court could not make an award for loss of dependency based on assumption, presumption or inference (see paras 50, 55 & 57–58).

(3) If the income of a deceased in whole or in part was not utilised to pay for the household or parts of educational needs but was kept aside as 'savings' for a future use (such as the future educational needs of the children), then such unused monies could not be taken into account when computing loss of support under s 7(3) of the Civil Law Act 1956. If the dependents could not prove that they had a direct and immediate monetary benefit from the income of the deceased 'at the time of the death' (which was the critical date), then, even if the deceased might have kept aside his/her surplus income, that would not be within the

definition of 'loss of support' but an invitation into the realm of surmise, speculation and uncertainty because the deceased's intention vis a vis the saved or unutilised monies (if he/she had lived) could well change or morph over time (see para 48).

(4) The prevalent practice of determining loss of dependency by knocking off 1/3 from the net income of a deceased and treating the balance as the multiplicand to compute loss of dependency was a flawed one, particularly when more than one family member was earning and capable of supporting the dependents or if there was one family member (parent) who earned a substantial income, like the deceased's husband in the present case. Trial courts should be astute and stoic in their approach to this issue and not be actuated by sympathy for the dependents. Otherwise, it would result in unjust enrichment because the court could end up making an award when there was in reality no loss of support (see paras 49–51).

(5) The respondents' post-trial submissions had no causal connection to the particulars of aggravated damages pleaded in the statement of claim. Hence, on pleadings alone, the claim for aggravated damages ought to have been rejected. At any rate, there was no clear and convincing evidence of any high-handed, oppressive, insulting or contumelious behaviour by the appellant hospital or its doctors which was perceived by the deceased and which might or could have increased her pain and suffering over and above the pain and suffering for which she was awarded general damages (see paras 81–82 & 111).

(6) Aggravated damages required a living claimant suffering from worsened emotional injury due to the defendant's conduct. It followed that once the claimant died, that claim died with him. The estate could not claim aggravated damages for any conduct of the defendants after the death of the deceased which might have caused distress to those near and dear to the deceased as the estate was not a sentient being and was incapable of perceiving or processing such aggravating conduct (see paras 101 & 112).

(7) The court's view on aggravated damages was that: (a) the claim for it must be expressly pleaded and properly particularised, stating the facts and circumstances relied upon where the plaintiff asserted that his/her dignity/pride/feelings had been injured; (b) the injury to the pride, feelings or dignity must have occurred at the same time as the occurrence of the tort. Events occurring after the occurrence of the tort, including pre-litigation conduct or conduct during litigation were not aggravating circumstances; (c) the estate of a deceased could sue for aggravated damages, but only for events which occurred before the deceased's death and provided the deceased was conscious/sentient and could have felt or perceived the aggravating conduct of the tortfeasor. The estate had no standing to sue for aggravated damages based on events or the tortfeasor's

conduct which occurred after the deceased's death; (d) the negligent act or omission of a tortfeasor must not be conflated with aggravating conduct, albeit, that the latter must be contemporaneous with the negligent act or omission. The conduct of the tortfeasor in the aftermath was irrelevant; and (e) the manner in which a tortfeasor conducted his defence or pursued his litigation strategy could not be the basis for aggravated damages and any offending conduct must be dealt with under the Rules of Court or the court's inherent jurisdiction (see para 138).

(8) The High Court's award of RM10,000 for trial costs was wholly inadequate and did not reflect the value of the work done. In all the circumstances, a sum of RM75,000 was a fair and reasonable figure (see paras 145–146).

[Bahasa Malaysia summary

Dalam Rayuan 1482, Mahkamah Tinggi telah mendapati perayu-perayu bertanggungan dalam suatu tuntutan kecuaian perubatan yang dibawa terhadap mereka oleh responden-responden mengenai kematian seorang wanita berusia 41 tahun ('si mati') yang merupakan isteri kepada responden pertama dan kakak kepada responden kedua. Mahkamah perbicaraan telah membenarkan sejumlah RM1,083,235.62 kepada responden-responden sebagai ganti rugi khas, am dan teruk, bayaran statutori untuk sumbangan kematian ('bereavement') dan kos. Ganti rugi khas terdiri daripada RM49,601.50 sebagai bayaran hospital dan perubatan, RM15,000 sebagai perbelanjaan pengebumian dan upacara memorial, RM10,000 sebagai kos mendapatkan rekod perubatan dan RM12,354.12 untuk mendapatkan surat kuasa mentadbir harta pusaka si mati ('LA'). Mahkamah turut menganugerahkan RM100,000 sebagai ganti rugi kesakitan dan penderitaan serta kehilangan kenikmatan hidup, RM700,000 sebagai ganti rugi teruk, RM10,000 sebagai sumbangan kematian dan RM176,280 sebagai kehilangan sokongan yang dikira pada kadar RM2,260 sebulan untuk enam setengah tahun menurut s 7 Akta Undang-Undang Sivil 1956. Rayuan-rayuan berkenaan oleh kedua-dua pihak hanyalah berhubung kuantum. Dengan persetujuan pihak-pihak, anugerah bagi bayaran hospital dikurangkan kepada RM33,000, manakala amaun bagi pengebumian dan upacara memorial, LA dan sumbangan kematian dikekalkan; sementara RM10,000 yang dianugerahkan bagi mendapatkan rekod perubatan melalui penzahiran pra-tindakan telah diketepikan. Mahkamah kemudiannya mendengar hujahan berhubung anugerah mahkamah perbicaraan bagi kesakitan dan penderitaan serta kehilangan kenikmatan hidup (RM100,000), ganti rugi teruk (RM700,000), kehilangan sokongan (kebergantungan) (RM176,280) dan kos perbicaraan (RM10,000). Alasan mahkamah perbicaraan menganugerahkan jumlah besar bagi ganti rugi teruk adalah berdasarkan dapatan bahawa perayu-perayu dalam Rayuan 1482 telah bertindak secara tidak profesional dengan: (a) cuba menunjukkan bahawa si mati dan suaminya cuai secara

menyumbang kerana keluar dari hospital perayu terhadap nasihat perubatan pada lawatan terdahulu (suatu dakwaan yang tidak pernah dibuktikan di perbicaraan); dan (b) cuba menyalahkan pakar lain di hospital perayu atas kematian si mati. Perayu-perayu berhujah bahawa si mati tidak boleh menuntut ganti rugi teruk kerana tuntutan sedemikian adalah bersifat peribadi kepada 'plaintif yang hidup' sahaja.

Diputuskan, sebulat suara mengurangkan gantirugi kesakitan dan penderitaan serta kehilangan kenikmatan hidup kepada RM50,000, mengenepikan anugerah-anugerah untuk kehilangan bantuan hidup dan gantirugi teruk dan menaikkan jumlah kos perbicaraan kepada RM75,000:

(1) Perayu-perayu dalam Rayuan 1482 berhujah bahawa jumlah RM25,000 sudah memadai sebagai anugerah bagi kesakitan dan penderitaan serta kehilangan kenikmatan hidup kerana si mati hanya mengalami kesakitan selama lebih kurang 24 jam sebelum kematiannya. Responden-responden pula bersedia menerima amaun yang dikurangkan kepada RM75,000 dengan hujah bahawa walaupun tempoh kesakitan adalah lebih kurang 24 jam, tahap kesakitan yang dialami si mati adalah amat dahsyat kerana tiga prosedur invasif telah dijalankan ke atas dirinya dalam tempoh tersebut. Setelah menimbangkan semua keadaan, mahkamah berpendapat bahawa sejumlah RM50,000 adalah anugerah yang adil dan munasabah bagi ganti rugi ini (lihat perenggan 25–26 & 29).

(2) Oleh kerana tiada keterangan bahawa si mati sebenarnya menyumbang sebanyak RM2,260 sebulan kepada perbelanjaan isi rumah, anugerah mahkamah perbicaraan sebanyak RM176,280 bagi kehilangan kebergantungan hendaklah diketepikan. Kehilangan kebergantungan adalah seumpama tuntutan ganti rugi khas dan mesti dibuktikan melalui keterangan yang jelas, meyakinkan dan kukuh bagi menunjukkan bahawa si mati benar-benar menyumbang sejumlah wang tertentu kepada perbelanjaan isi rumah. Mahkamah tidak boleh membuat anugerah bagi kehilangan kebergantungan berdasarkan anggapan, andaian atau inferens (lihat perenggan 50, 55 & 57–58).

(3) Jika pendapatan si mati, sama ada sebahagian atau keseluruhannya, tidak digunakan untuk menampung perbelanjaan isi rumah atau keperluan pendidikan tetapi disimpan sebagai 'simpanan' untuk kegunaan masa hadapan (seperti keperluan pendidikan anak-anak pada masa hadapan), maka wang yang tidak digunakan itu tidak boleh diambil kira dalam pengiraan kehilangan kebergantungan di bawah s 7(3) Akta Undang-Undang Sivil 1956. Jika tanggungan tidak dapat membuktikan bahawa mereka menerima manfaat kewangan secara langsung dan serta-merta daripada pendapatan si mati 'pada masa kematian' (yang merupakan tarikh kritikal), maka walaupun si mati mungkin

menyimpan lebihan pendapatannya, ianya tidak termasuk dalam takrif 'kehilangan kebergantungan' tetapi hanya mengundang spekulasi dan ketidakpastian, kerana niat si mati terhadap wang yang disimpan atau tidak digunakan itu (sekiranya beliau hidup) boleh berubah dari semasa ke semasa (lihat perenggan 48).

(4) Amalan lazim menolak 1/3 daripada pendapatan bersih si mati dan menggunakan bakinya sebagai pendarab untuk mengira kehilangan kebergantungan adalah suatu pendekatan yang tidak betul, terutamanya apabila terdapat lebih daripada seorang ahli keluarga yang bekerja dan mampu menyara tanggungan, atau apabila terdapat seorang ahli keluarga (seperti ibu atau bapa) yang mempunyai pendapatan besar, seperti suami si mati dalam kes ini. Mahkamah perbicaraan hendaklah bersikap teliti dan tegas dalam menangani isu ini dan tidak dipengaruhi oleh simpati kepada tanggungan. Jika tidak, ianya akan membawa kepada pengkayaan yang tidak wajar kerana mahkamah mungkin menganugerahkan sejumlah wang padahal pada hakikatnya tiada kehilangan kebergantungan yang berlaku (lihat perenggan 49–51).

(5) Hujahan selepas perbicaraan pihak responden tidak mempunyai sebarang hubungan dengan butiran ganti rugi teruk yang telah dinyatakan dalam pernyataan tuntutan. Oleh itu, berdasarkan pliding semata-mata, tuntutan bagi ganti rugi teruk sepatutnya ditolak. Walau bagaimanapun, tiada keterangan jelas dan meyakinkan mengenai sebarang perlakuan angkuh, menindas atau menghina oleh hospital perayu atau para doktornya yang telah disedari oleh si mati dan yang mungkin atau boleh meningkatkan kesakitan dan penderitaan si mati melebihi kesakitan dan penderitaan yang telah diberikan pampasan melalui ganti rugi am (lihat perenggan 81–82 & 111).

(6) Ganti rugi teruk memerlukan seorang yang membuat tuntutan yang masih hidup dan yang mengalami kecederaan emosi yang bertambah buruk akibat perlakuan defendan. Justeru, apabila penuntut meninggal dunia, tuntutan tersebut turut luput bersamanya. Harta pusaka tidak boleh menuntut ganti rugi teruk atas apa-apa perlakuan defendan selepas kematian si mati yang mungkin menyebabkan tekanan emosi kepada orang terdekat dengan si mati kerana harta pusaka ('estate') bukan entiti yang mempunyai perasaan dan tidak berkeupayaan untuk menyedari atau memproses perlakuan yang bersifat memperburukkan tersebut (lihat perenggan 101 & 112).

(7) Mahkamah ini berpendapat bahawa tuntutan ganti rugi teruk adalah: (a) tuntutan ganti rugi teruk mestilah secara nyata diplidkan dan diperincikan dengan sewajarnya, dengan menyatakan fakta serta keadaan yang menjadi sandaran di mana plaintif mendakwa maruah/kebanggaan/perasaannya telah tercalar; (b) kecederaan terhadap maruah, perasaan atau kebanggaan mestilah berlaku serentak dengan

kejadian tort. Peristiwa selepas berlakunya tort termasuk perlakuan sebelum litigasi atau semasa litigasi bukanlah keadaan yang boleh dianggap sebagai pemberatan; (c) harta pusaka simati boleh menuntut ganti rugi teruk, tetapi hanya bagi peristiwa yang berlaku sebelum kematian si mati dan dengan syarat si mati masih sedar/berkeupayaan merasai atau menyedari perlakuan pemberatan oleh pelaku tort. Harta pusaka tidak mempunyai kedudukan untuk menuntut ganti rugi teruk berdasarkan perlakuan tortfeasor yang berlaku selepas kematian si mati; (d) kecuaian oleh tortfeasor tidak boleh dikelirukan dengan perlakuan mengaggravasi, walaupun perlakuan mengaggravasi tersebut mesti berlaku serentak dengan perbuatan atau cuai yang menimbulkan tort. Tindakan pelaku tort selepas kejadian adalah tidak relevan; dan (e) cara pelaku tort mengendalikan pembelaannya atau strategi litigasinya tidak boleh menjadi asas pemberian ganti rugi teruk. Sebarang perlakuan yang menyinggung peraturan perlu ditangani melalui Kaedah-Kaedah Mahkamah atau bidang kuasa asal mahkamah (lihat perenggan 138).

(8) Anugerah RM10,000 oleh Mahkamah Tinggi bagi kos perbicaraan adalah sama sekali tidak memadai dan tidak mencerminkan nilai kerja yang telah dilaksanakan. Mengambil kira keseluruhan keadaan, jumlah RM75,000 adalah suatu kadar yang adil dan munasabah (lihat perenggan 145–146).]

Cases referred to

AB v South West Water Services Ltd [1993] QB 507, CA (refd)

Ashley v Chief Constable of Sussex Police [2008] UKHL 25; [2008] 1 AC 962; [2008] 2 WLR 975; [2008] 3 All ER 573, HL (refd)

Au Meng Kai v Gan See Sin (sebagai bapa yang sah dan penanggungan kepada Gan En Teck, simati, untuk diri sendiri) & Anor [2021] MLJU 2300; [2021] CLJU 1933; [2021] MLRHU 1828, HC (refd)

Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor [2001] 6 MLJ 497; [2001] 4 CLJ 433, HC (not folld)

Cassell & Co Ltd v Broome [1972] AC 1027, HL (refd)

Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd (Hong Hing Thai Enterprise Sdn Bhd, third party) [2011] 4 MLJ 354, HC (refd)

Dato' Abdullah Hishan bin Haji Mohd Hashim v Sharma Kumari Shukla (No 3) [1999] 6 MLJ 589, HC (refd)

Dato' Stanley Isaacs (suing by himself and as the administrator of the estate of To' Puan Suzanne Thomas, deceased) v The Government of Malaysia & Ors [2019] 8 MLJ 331; [2019] 1 CLJ 626, HC (refd)

Dr Chandran a/l Gnanappah v Gan See Joe (suing as the administrator of the estate of Gan Hong Wee, deceased) & Anor and another appeal [2025] 5 MLJ 216; [2025] CLJU 1144; [2025] AMEJ 1196, CA (refd)

Fiona Conway v Irish National Teachers Organisation and others [1991] 2 IR 305, SC (refd)

Hassnar bin MP Ebrahim @ Asainar v Sulaiman bin Pong & Ors [2018] 1 MLJ 346; [2017] CLJU 1167, CA (not folld)

Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1, FC (refd)

Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals [2018] 3 MLJ 184, FC (refd)

Koperal Zainal bin Mohd Ali & Ors v Selvi a/p Narayan (joint administrator and dependant of Chandran a/l Perumal, deceased) & Anor [2021] 3 MLJ 365, FC (refd)

Kralj and another v McGrath and another [1986] 1 All ER 54, QBD (refd)

Lee Kok Chian v Cheok Lam Chuan and another appeal [2025] MLJU 2273; [2025] CLJU 1818, CA (refd)

Navin Sharma a/l Karam Chand (menyaman sebagai suatu pentadbir harta pesaka Suman Rampal a/p Hardyal Rampal, simati) & Anor v Bukit Tinggo Hospital Sdn Bhd & Anor [2023] MLJU 2370; [2023] CLJU 2099, HC (refd)

Noor Azlin bt Abdul Rahman & Anor v Changi General Hospital Pte Ltd [2021] SCD 464; [2022] 1 SLR 689; [2021] SGCA 111, CA (folld)

Paul and another v Royal Wolverhampton NHS Trust; Polmear and another and Royal Cornwall Hospitals NHS Trust; Purchase and Ahmed [2024] UKSC 1, SC (refd)

Rebecca Mathew & Ors v Syarikat Kerjasama Serbaguna Gema Wong Siang Bhd & Anor [1990] 1 MLJ 443, HC (refd)

Rookes v Barnard [1964] AC 1129; [1964] 1 All ER 367; [1964] 2 WLR 269; [1964] 1 Lloyd's Rep 28, HL (refd)

Selvi a/p Narayan & Anor (joint administrator for the estate and dependant of Chandran a/l Perumal, deceased) v Koperal Zainal bin Mohd Ali & Ors [2017] 9 MLJ 300, HC (refd)

Thangavelu v Chia Kok Bin [1981] 2 MLJ 277 (refd)

Thompson v Commissioner of Police of the Metropolis; Hsu v Commissioner of Police of the Metropolis [1997] 2 All ER 762, CA (refd)

Vincent Manickam s/o David (suing by himself and as administrator of the estate of Catherine Jeya Sellamah, deceased) & Ors v Dr S Hari Rajah & Anor [2018] 2 MLJ 497; [2017] 8 CLJ 27, CA (distd)

Legislation referred to

Civil Law Act 1956 ss 7, 7(3), 8, 8(2)

Rules of Court 2012 O 14, O 14A, O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d), O 33, O 59, O 59 rr 5, 6, 8(b)

Water Act 1989 [UK]

Appeal from: *Navin Sharma a/l Karam Chand (menyaman sebagai suatu pentadbir harta pusaka Suman Rampal a/p Hardyal Rampal, simati) & Anor v Bukit Tinggi Hospital Sdn Bhd & Anor* [2023] MLJU 2370 (High Court, Klang)

Amos Siew Yih Jhien (with Nicole Bor Wen Shen) (Azim, Tunku Farik & Wong) in the Civil Appeal No B-02(NCvC)(W)-1482–09 of 2023 for the appellants.
Manmohan Singh Dhillon (with Karthi Kanthabalan and Navpreet Kaur) (PS Ranjan & Co) in the Civil Appeal No B-02(NCvC)(W)-1483–09 of 2023 for the appellants.
Manmohan Singh Dhillon (with Karthi Kanthabalan and Navpreet Kaur) (PS Ranjan & Co) in the Civil Appeal No B-02(NCvC)(W)-1482–09 of 2023 for the respondents.
Amos Siew Yih Jhien (with Nicole Bor Wen Shen) (Azim, Tunku Farik & Wong) in the Civil Appeal No B-02(NCvC)(W)-1483–09 of 2023 for the respondents.

Nantha Balan JCA:

INTRODUCTION

[1] There are two appeals before us — Civil Appeal No B-02(NCvC)(W)-1482–09 of 2023 ('Appeal 1482') and Civil Appeal No B-02(NCvC)(W)-1483–09 of 2023 ('Appeal 1483'). The appeals arise out of a medical negligence claim by the plaintiffs against a private hospital and the medical officer in the Accident and Emergency Department of the hospital at the material time. The plaintiffs' claim was by way of High Court at Klang Suit No Bl-22NCVC-12–05 of 2022. The plaintiffs' claim was allowed. The High Court allowed various heads of damages and both sides have appealed to this court. The appeals are against the decision of the learned judge ('the judge') of the High Court in Klang delivered on 15 August 2023 after a full trial. The decision of the High Court is reported as *Navin Sharma a/l Karam Chand (menyaman sebagai suatu pentadbir harta pusaka Suman Rampal a/p Hardyal Rampal, simati) & Anor v Bukit Tinggi Hospital Sdn Bhd & Anor* [2023] MLJU 2370; [2023] CLJU 2099 (HC).

PARTIES

[2] For convenience and consistency, the parties shall be referred to by their titles in the action in the High Court. The appellants in Appeal 1482 shall be referred to collectively as 'the defendants' and individually as 'D1' and 'D2'. The appellants in Appeal 1483 shall be referred to collectively as 'the plaintiffs' and individually as 'P1' and 'P2'. Where necessary, we may refer to Appeal 1482 as 'the defendants' appeal' and Appeal 1483 as 'the plaintiffs' appeal'. D1 is the owner and operator of a private hospital known as Bukit Tinggi Medical Centre (previously known as Manipal Hospital) ('the Hospital').

A **[3]** The action in the High Court was filed by the plaintiffs as administrators of the estate of Suman Rampal ('deceased') for claims under s 8 of the Civil Law Act 1956 ('the CLA'), and on behalf of the dependents of the deceased for loss of dependency under s 7 of the CLA. P1 was the husband of the deceased. P2 was the sister of the deceased.

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[4] The appeals are confined to the issue of quantum as the defendants had accepted the High Court's finding on liability for negligence which resulted in the death of the deceased who was 41 years old at the time of her death. However, although liability for negligence is not contested in the appeals before us, we think that it is nevertheless necessary to set out the background facts (briefly) to provide some context and to allow for a better appreciation of the issues relating to the heads of damages which have been raised and contested in these appeals.

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BACKGROUND

[5] On 13 May 2019 at about 4.10am, the deceased was taken to the Accident and Emergency Department ('A&E') of the Hospital because of severe abdominal pain which she had been experiencing two days before being taken to the Hospital. She had a history of Immunoglobin A nephropathy and was on long term steroid (Prednisolone). The deceased was seen by D2. She complained that her pain was getting worse and was mostly felt on the right flank of her abdomen.

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[6] The deceased gave a good description of her condition and also gave a complete history of her illness. She told D2 of her urinary tract infection ('UTI') which she had suffered some weeks earlier but which had resolved. She also gave a history of receiving antibiotics for the UTI and produced the blood and urine investigation results undertaken at the clinic from which she had received treatment. She also described the type of pain she was experiencing and was able to distinguish her current pain from the pain she had experienced when she had the UTI.

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[7] She informed D2 that the current pain was one sided and described it as 'colicky in character'. The pain that the deceased was experiencing was in fact 'endometriotic colic' in nature and pointed to a gynecological cause. The deceased also gave a history of an 8cm ovarian cyst. D2 performed a trans-abdominal ultrasound scan and noted 'a right ovarian mass? Cyst size 8cm'. As a matter of fact, the '8cm' cyst described by D2 was a wrong finding in terms of its size. The cyst was in fact very much bigger and the correct measurement was '11.2cm x 8cm'. The blood investigations ordered by D2 revealed extremely high white blood count. The urine test results revealed the findings of urea at 19.8 and nitrite to be negative. The evidence disclosed that

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D2 was not aware that in a patient like the deceased who was on long term (Prednisolone) steroid therapy for Glomerulonephritis, her normal white blood count would be much lower than that of the general population. Therefore, the finding of 15.6 for white blood count which the deceased had was a clear sign of a serious infection.

[8] This was compounded by the fact that D2 was not aware that a patient like the deceased will also not show common signs like fever and tachycardia (increased heart beat) in the presence of an infection. This is because the long-term steroid therapy would have suppressed such inflammatory responses. Ultimately, the laboratory test results, the trans-abdominal ultrasound scan finding, the specific complaints of pain and the history of previous ovarian cyst with abscess, all pointed towards only one possible cause, namely, that the deceased was suffering from an acute gynecological problem. Most likely a ruptured ovarian cyst. D2 formed an impression that the deceased has 'Recurrent UTI' and 'Nephrotic Syndrome Relapse'.

[9] D2 contacted the urologist on call, Dr Amit Kumar Sharma ('Dr Amit') for his opinion. Dr Amit apparently told D2 to seek the opinion of their nephrologist on call. However, D2 decided to refer the deceased to Pusat Perubatan Universiti Kebangsaan Malaysia ('PPUKM') where she was already being treated for her nephrology condition. D2 gave the deceased a referral letter. According to the plaintiffs, D2 did not appreciate the imminent danger that lay ahead for the deceased. D2 allegedly told the deceased and her husband (P1) that they could go to PPUKM sometime later that day as her condition was not urgent. She was discharged at 6.30am. Shortly after reaching home, she started experiencing pain and had breathing difficulty. She was rushed back to the Hospital via ambulance at or around 10.43am on the same day. The deceased was taken to the A&E with complaints of chest pain, abdomen pain and shortness of breath.

[10] A computerised tomography scan ('CT scan') was carried out, and it revealed a large pelvic fluid collection with bowel adherent. The deceased was admitted to the Intensive Care Unit ('ICU') on the same day. Unfortunately, by the time the gynecologist had attended to her, the ruptured cyst had become untreatable. The infection from the ruptured cyst had spread to her whole body and caused the deceased to suffer from septicemia. Her kidneys failed. The deceased was intubated and underwent a retrograde pyelography and stenting of bilateral urinary system, a laparotomy, hemodialysis and appendectomy and repair of umbilical hernia. Despite the belated aggressive medical and surgical treatment, the deceased died on 14 May 2019 at 4.27pm. The cause of death was recorded as — 'fulminant septic shock with acute renal failure' and underlying cause was 'tube ovarian abscess and immunosuppression secondary to long term Prednisolone therapy for Glomerulonephritis with severe sepsis'.

THE HIGH COURT'S ORDER (QUANTUM)

[11] The High Court awarded the following:

No	Item	RM	RM
1	Ganti rugi khas		
1.1	Perbelanjaan hospital dan perubatan;	49,601.50	
1.2	Perbelanjaan pengebumian dan upacara memperingati;	15,000	
1.3	Kos mendapatkan penzahiran pra-tindakan rekod-rekod perubatan;	10,000	
1.4	Kos untuk mendapatkan surat kuasa mentadbir;	12,354.12	
1.5	Gaji tambahan yang dibayar kepada pembantu rumah;	Tidak di-awadkan	
	Sub-jumlah		86,955.62
2.	Ganti rugi am untuk kesakitan dan penderitaan dan kehilangan keselesaan hidup	100,000	
3.	Ganti rugi teruk	700,000	
4.	Ganti rugi masa hadapan		
4.1	Kehilangan sumbangan, dikira pada kadar RM2,260 sebulan untuk 6.5 tahun (55-42 dibahagikan oleh 2 = 6.5)	176,280	
5.	Nilai penjagaan dan perkhidmatan kepada rumah tangga dikira pada kadar RM1,500 sebulan untuk setiap anak;	Tidak di-awadkan	
6.	Kehilangan statutori;	10,000	
	Sub-jumlah		986,280
7.	Kos	10,000	
	Sub-jumlah		10,000
	Jumlah		1,083,235.62
8.	Faedah		
8.1	Faedah ke atas ganti rugi khas pada kadar 4% setahun dari tarikh kejadian, 13 Mei 2019 sehingga tarikh penghakiman, 15 Ogos 2023;		
8.2	Faedah ke atas ganti rugi am dan ganti rugi teruk pada kadar 8% setahun dari tarikh penyampaian writ, 3 Jun 2022 sehingga tarikh penghakiman, 15 Ogos 2023; dan		

8.3 Faedah ke atas jumlah penghakiman pada kadar 5% setahun dari tarikh penghakiman sehingga tarikh pembayaran penuh.

OUR DECISION

[12] Both sides are aggrieved by the judge's said decision. In this regard, the plaintiffs wanted some items of damages to be enhanced, whilst the defendants wanted several items of damages to be completely set aside, or alternatively, revised downwards. The disputed items were duly tabulated and numbered as may be seen from the document filed as encl 29 in Appeal 1482. When the appeals came on for hearing, counsel informed us they had resolved some of the disputed items. We shall deal with each of the items in turn.

[13] We shall start with item 1 which is a special damage claim for RM49,601.50 being the second bill (hospital's charges) which was issued in respect of the deceased's admission to the ICU.

[14] In respect of this item, counsel for the defendants argued that the deceased would have incurred the hospital charges in any case. In response, counsel for the plaintiffs argued that eventually the deceased died and that the second emergency was due to D2's misdiagnosis.

[15] Counsel for the plaintiffs relied on the Court of Appeal's recent decision in *Dr Chandran a/l Gnanappah v Gan See Joe (suing as the administrator of the estate of Gan Hong Wee, deceased) & Anor and another appeal* [2025] 5 MLJ 216; [2025] CLJU 1144; [2025] AMEJ 1196 (CA) ('*Dr Chandran*'s case') which held at para [62] that the medical/hospital expenses of the deceased in that case, constituted 'reasonable expenses incurred as a result of the wrongful act, neglect or default of the defendants' as understood in s 7(3) of the Civil Law Act 1956. Thus, in the present case, it was submitted that the plaintiffs are entitled to recover all expenses reasonably incurred. Counsel for the plaintiffs went on to say that he was willing to concede a deduction of 1/3 for the sake of a settlement, and would therefore accept RM33,000.

[16] As far as we are concerned on this issue, we agreed that the plaintiffs are entitled to all expenses reasonably incurred, and given that counsel for the plaintiffs had made the concession, we ordered that the defendant's appeal be allowed, and that item 1 (RM49,601.50) be varied and accordingly reduced to RM33,000.

[17] As for item 2, which is funeral and memorial services expenses, counsel for the defendants said that he was withdrawing his appeal. Hence, we ordered

A that the defendant's appeal vis a vis item 2 be dismissed.

[18] As for item 3 ie cost of obtaining medical records via pre-action discovery for which a sum of RM10,000 was claimed and allowed by the judge, counsel for the plaintiffs said that he concedes and withdraws the claim. As such, in view of the concession by counsel for the plaintiffs, the defendants' appeal is allowed and the sum of RM10,000 awarded by the High Court is therefore set aside.

[19] As for item 4 (RM12,354.12) being the cost of obtaining letters of administration, counsel for the defendants conceded and withdrew the appeal. As such, the defendants' appeal on item 4 (RM12,354.12) is dismissed.

[20] As for item 5, additional salary for a maid which was not awarded by the High Court, counsel for the plaintiffs said that he was withdrawing the claim. Hence, the plaintiffs' appeal vis a vis (item 5) is dismissed.

[21] Items 6, 7 and 10 are dealt with as separate topics in the paragraphs that follow. Item 6 pertains to the plaintiffs' claim on behalf of the estate of the deceased for pain and suffering and loss of amenities for which a sum of RM100,000 was awarded. Item 7 pertains to the plaintiffs' claim for loss of support (dependency claim under s 7 of the CLA) for which a sum of RM176,280 was awarded. Item 10 which is the claim for aggravated damages for which a sum of RM700,000 was awarded.

[22] The plaintiffs' claim for the value of care and service provided to the deceased's children until they reach adulthood (item 8) was rejected by the High Court. Counsel for the plaintiff withdrew the claim before us. Hence, the plaintiffs' appeal vis a vis item 8 is dismissed.

[23] The defendants withdrew item 9 (bereavement) for which RM10,000 was allowed. Hence, the defendants' appeal vis a vis item 9 is dismissed.

Pain and suffering and loss of amenities (item 6)

[24] The judge awarded RM100,000 for pain and suffering. This is a claim by the estate of the deceased (s 8 of the CLA). The judge's reasons for the award of RM100,000 for pain and suffering and loss of amenities are found at para 36(i) of her grounds of judgment. Paragraph 36(i) has been reproduced (without any editing) and reads as follows:

> Suman suffered from intense abdominal pain which led her to coming to the A&E of the first defendant at about 4.30am. The fact that she came at the wee hours in the morning shows that she is in real pain that she cannot wait to come later that

morning. Unfortunately, the defendants did not treat her properly and professionally where she was not referred to a gynaecologist, the specialist who would have done the necessary procedure to ease her pain.

She was discharge despite being in pain which later she developed difficulty in breathing at home and once again she was rushed to first defendant. Unfortunately, this second round when she could get the attentions of specialist, it is too late and she succumb to her illness. For this and looking at the authorities submitted by parties, the appropriate damages is RM100,000 awarded for general damages for pain and suffering and loss of amenities.

[25] Before us counsel for the defendants emphasised that the deceased had only experienced pain and suffering for a limited period of around 24 hours. Thus, it was submitted that RM100,000 which was awarded by the High Court was inordinately excessive and that on the facts here, a sum of RM25,000 would be fair and reasonable.

[26] On the other hand, the plaintiffs' opening position was that RM100,000 should be maintained. But counsel for the plaintiffs said that he was willing to concede to RM75,000. In amplification, counsel for the plaintiffs emphasised that although the duration was very short (about 24 hours), during that period the deceased went through tremendous pain because of three invasive procedures. Counsel said that the sum awarded must commensurate with the pain associated with the procedures. Counsel drew our attention to the judgment of Aliza Sulaiman JC (now judge) in *Dato' Stanley Isaacs (suing by himself and as the administrator of the estate of To' Puan Suzanne Thomas, deceased) v The Government of Malaysia & Ors* [2019] 8 MLJ 331; [2019] 1 CLJ 626, at para [71] where the deceased suffered five days of pain and the estate was awarded RM100,000. And in *Dr Chandran*'s case, the deceased was unconscious and suffered pain and suffering for about one month and the High Court awarded RM100,000. In response, it was pointed out by counsel for the defendants that in *Dr Chandran*'s case, the deceased was unconscious.

[27] However, in the present case before us, the deceased was conscious and therefore sentient. On the issue of whether the patient did or did not experience pain or was conscious of the pain, it is relevant perhaps to refer to the case of *Thangavelu v Chia Kok Bin* [1981] 2 MLJ 277 (HC) where the facts were as follows. The victim was a young boy named Subramaniam. He was involved in a motor-vehicle accident. After the accident, Subramaniam was taken to the Kajang District Hospital in a state of coma (coma IV) with haematoma on left temporal region and abrasions over left knee and left forearm (see exh AB6). From the District Hospital he was later transferred to the General Hospital at Kuala Lumpur.

[28] On admission he was on examination found to be in a state of coma responding to deep pain only. He underwent an emergency operation on the evening of the same day. As post-operatively the patient did not show any improvement in spite of intensive care, and as his condition was getting static and as he needed no further neurosurgical treatment he was discharged from the General Hospital and transferred back to Kajang District Hospital on 26 November 1974. He subsequently passed away on 15 October 1975, ie, eleven months and six days after the accident. The court held:

> Although he was in a state of unconsciousness, the boy before his death was not totally unconscious as was the case of the eight year old child in *Andrews v Freeborough* [1966] 2 All ER 721 who was unconscious for about a year; and the young woman of twenty years in *Wise v Kaye* [1962] 1 QBD 638 who lay unconscious in hospital for three and a half years. *While generally I agree with the submission of counsel for the defendant that the more conscious the injured was of his condition the greater must be the amount of damages to be awarded, and that if a person was not conscious at all, there should be no award or the award should be nominal, in the instant case the boy was, as I said, not totally unconscious*.
>
> The medical report of the General Hospital, Kuala Lumpur, on the patient (exh AB7) as to his head injuries was as follows:
>
> > On examination the patient was in a state of coma, responding to deep pain only. He was noted to have a scalp hematoma at the left side and a right hemiparesis. The left pupil was dilated and fixed to light, the right was constricted. Blood pressure was 110/80. Abdomen and chest was normal on examination. Skull x-ray showed a depressed fracture of left parietal bone. He underwent an emergency operation on the evening of admission. Small mount of epidural clot was found over the temporal and parietal region. The brain tissue beneath the depressed fracture was badly contused, no subdural hematoma was found.
>
> His father's evidence (which was not contradicted) was that whenever he called his son by name he would respond with a sound. To put it at the highest, therefore, the boy in the months before his death was only conscious of familiar voices. Most probably, he was in a state of consciousness in which pain could be appreciated but what is difficult to determine in a case such as this is whether in the state he was in he suffered much to financially benefit his estate substantially under this head of claim for general damages for pain and suffering.
>
> In *Andrews v Freeborough* it was held that notwithstanding that the child of eight years, from the time of her being injured until her death nearly a year later was unconscious and without pain and without appreciation of what had happened to her, she would have been entitled if she had lived to recover, in addition to damages for loss of expectation of life, substantial damages in respect of the injuries sustained which resulted in the loss of her faculties for nearly a year. In that case, the child sustained severe brain injury in a motor accident and lost consciousness at once. The trial judge awarded the sum of £2,000 in respect of actual injuries and the consequent loss of amenities. The Court of Appeal found no sufficient reason to interfere with this award of £2,000. In *Wise v Kaye* [1962] 1 QBD 638, the same Court of Appeal in an earlier decision had held that the fact that a plaintiff would be

unable to enjoy personally any award of damages, and (except as an element of damages for pain and suffering) was ignorant of the loss suffered was irrelevant. This was a case where the plaintiff received serious brain injuries in a motor car accident and as a result never recovered consciousness with no prospect whatever of recovery.

In the present suit, there existed an element of pain and suffering though in my opinion it was not of a high degree. As in cases where a patient had been totally unconscious after an accident and as far as could be ascertained had suffered no pain, a substantial award of £2,000 had been awarded by way of pain and suffering (*Andrews v Freeborough*) following upon the earlier case of *Wise v Kaye* where an award of £15,000 by way of general damages was ordered, I would in the particular circumstances of the present suit assess the sum of $20,000 for pain and suffering and loss of amenities.

[29] Hence, in a situation like this, the award of pain and suffering and loss of amenities is necessarily fact sensitive and the circumstances of each case will undoubtedly be different. Here, the deceased suffered tremendous pain and was conscious for the period of about 24 hours and she went through three rounds of trauma associated with the invasive procedures which were carried out by the specialists. Considering all the circumstances of this case (which is confined to the peculiar facts here and not as a precedent applicable in all cases) and having regard to the award in *Dr Chandran*'s case where RM100,000 was awarded, we think that for this case, a sum of RM50,000 would be fair and reasonable for pain and suffering and loss of amenities. Hence, the defendants' appeal is allowed to that extent, and the sum of RM100,000 for pain and suffering and loss of amenities is reduced to RM50,000.

The dependency claim (loss of support)

[30] We turn now to item 7 (loss of dependency) where the High Court had awarded RM176,280 on the basis of a contribution (by the deceased) of RM2,230 per month x 6.5 years x 12 months. A dependency claim falls within s 7(3) of the CLA.

[31] Section 7 of the CLA reads as follows:

7 Compensation to the family of a person for loss occasioned by his death

(1) Whenever the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code.

...

A (3) The damages which the party who shall be liable under subsection (1) to pay to the party for whom and for whose benefit the action is brought shall, subject to this section, be such as will *compensate the party for whom and for whose benefit the action is brought for any loss of support suffered* together with any reasonable expenses incurred as a result of the wrongful act, neglect or default of the party liable under
B subsection (1):

Provided that —

...

(ii) damages may be awarded in respect of the funeral expenses of the person
C deceased if such expenses have been incurred by the party for whose benefit the action is brought;

...

(iv) in assessing the loss of earnings in respect of any period after the death of a
D person where such earnings provide for or contribute to the damages under this section the Court shall —

(a) take into account that where the person deceased has attained the age of fifty five years at the time of his death, his loss of earnings for any period after his death shall not be taken into consideration; and in the case of any
E other person deceased, his loss of earnings for any period after his death shall be taken into consideration if it is proved or admitted that the person deceased was in good health but for the injury that caused his death and was receiving earnings by his own labour or other gainful activity prior to his death;

F

(b) take into account only the amount relating to the earnings as aforesaid and the Court shall not take into account any prospect of the earnings as aforesaid being increased at any period after the person's death;

(c) take into account any diminution of any such amount as aforesaid by such
G sum as is proved or admitted to be the living expenses of the person deceased at the time of his death;

(d) take into account that in the case of a person who was of the age of thirty years and below at the time of his death, the number of years' purchase shall be 16; and in the case of any other person who was of the age range
H extending between thirty one years and fifty four years at the time of his death, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time of death and dividing the remainder by the figure 2. (Emphasis added.)

I **[32]** In para 8 of the statement of claim, the plaintiffs gave the details of the dependents as follows:

PARTICULARS OF PERSONS UNDER SECTION 7 OF THE CIVIL LAW ACT 1956

Name	Relationship to the Deceased	Date of Birth
Pushpa Devi d/o Sham Lal	Mother	19.07.1945
Navin Sharma s/o Karam Chand	Husband (P1)	28.10.1975
Kenissha Sharma d/o Navin Sharma	Daughter	23.08.2010
Rishan Sharma	Son	10.02.2015

[33] The plaintiffs had also pleaded the following for purposes of the claim for loss of dependency under s 7 of the CLA:

> 23. The Plaintiffs also claim for the benefit of the deceased's estate damages for the loss of the deceased's contribution to the household, calculated according to the statutory formula fixed in the Civil Law Act 1956.

[34] In para 36(iii) of the grounds of judgment the judge gave the following reasons for allowing the claim for loss of dependency:

> Plaintiffs claimed under s 7(3)(iv)(d) of the Civil Law Act 1956 for the loss of contribution suffered by the dependents of a deceased person as follows:
>
> (3) The damages which the party who shall be liable under subsection (1) to pay to the party for whom and for whose benefit the action is brought shall, subject to this section, be such as will compensate the party for whom and whose benefit the action is brought for any loss of support suffered together with any reasonable expenses incurred as a result of the wrongful act, neglect or default of the party liable under subsection (1):
>
> Provided that —
>
> ...
>
> (iv) in assessing the loss of earnings in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section the Court shall:
>
> ...
>
> (d) take into account that in the case of a person who was of the age of thirty years and below at the time of his death, the number of years' purchase shall be 16; and in the case of any person who was of the age range extending between thirty one years and fifty four years at the time of his death, the number of years' purchase shall be calculated by using the figure 55 minus the age of the person at the time of death and dividing the remainder by the figure 2.
>
> Suman was employed at her sister's law firm, Messrs Norendra & Yap. She did clerical and administrative work. She was also pursuing part time degree in BOJ at

A University of Malaya. he last drawn salary was RM3000 after deductions for EPF and SOCSO.

There was the employer's contribution to EPF and SOCSO. This court agrees and accepted the mode of calculation done by Plaintiff and awarded the Plaintiff RM176,280.

B

[35] The defendants complaint vis a vis the alleged claim for loss of dependency per the memorandum of appeal is couched in the following terms:

Loss of Contribution

C

10. The Learned Judge has erred in law and/or in fact in awarding the loss of contribution in the sum of RM176,280 which is *excessive and without any factual or legal basis*.

D **[36]** Before us, the defendants argued that there was no evidence of any financial support given by the deceased and hence should be no award as loss of dependency was not proven. Clearly, the judge had agreed with and adopted the formula furnished by the plaintiffs and had accepted the multiplicand of RM2,260 per month for computations. Counsel for the plaintiffs E acknowledged quite frankly there was no evidence that the deceased gave RM2,260 per month. Indeed, counsel said that P1 could not say with any certainty that the deceased made any contribution to the household expenses. But counsel for the plaintiffs sought to justify the award of RM176,280 on the following basis. He agreed that the deceased's husband did not testify as to how F much the deceased had contributed.

[37] Despite lack of any direct evidence as to whether the deceased did make any contribution, counsel argued that the court can 'infer' that being a mother of two children, she would have made some contribution. At any rate, counsel G was prepared to concede that the amount of her contribution may be less than what the High Court had given. He said that he would leave it to the court to exercise its discretion to award a fair and reasonable sum as loss of dependency.

[38] It is perhaps relevant to mention that the statement of claim does not H state how much the deceased was contributing to the household expenses. This is unsurprising because in fact, the deceased did not make any financial contribution. Again, this is not startling because P1 was earning about RM20,000 per month and he shouldered the entire financial burden.

I **[39]** As a fallback, counsel for the plaintiffs referred us to the decision of the Court of Appeal in *Vincent Manickam s/o David (suing by himself and as administrator of the estate of Catherine Jeya Sellamah, deceased) & Ors v Dr S Hari Rajah & Anor* [2018] 2 MLJ 497; [2017] 8 CLJ 27 (CA). In *Vincent Manickam*, the Court of Appeal held that even if there was no direct financial

contribution by the deceased towards the household expenses, so long as there is evidence that the deceased was gainfully employed, and was earning sufficiently such that a contribution could be made or her earnings could be utilised at a future date for say the education of the children, a claim for dependency would still succeed. Thus, if there was evidence that the deceased saved up for purposes of contributing to the family's financial pool for the future education needs of the children of the deceased. The Court of Appeal's opinion on this topic is to be gathered from the following paragraphs which read as:

> Quantum
>
> [91] In this appeal, the appellants are only pursuing their dissatisfaction with two aspects of the learned judge's award on quantum: the appellants' claims for loss of contribution or loss of support; and the failure of the learned judge to award pre-judgment interest.
>
> [92] Insofar as the claim for loss of support of RM518,786.40 is concerned, this was a claim for the loss of Catherine's contribution to supporting the appellants, especially the children. Catherine's ability to support the appellants financially was derived from her total earnings of RM12,808.05 per month that she earned as a teacher/senior assistant, and from the private tuitions that she gave.
>
> This contribution was rejected by the learned judge because SP1 (Catherine's husband/first appellant) testified that *the family used his total income each month for their needs. That left Catherine's income unused*.
>
> *Almost the entire of Catherine's income was saved in their joint account*. In dismissing the claim for this loss, the learned judge relied on the Federal Court's decision in *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119; [1974] CLJU 61; [1974] 1 LNS 61.
>
> [93] Learned counsel for the appellants submitted that the learned judge had erred because *she merely considered the fact that Catherine's income was saved, and not what it was saved for*. The learned judge had failed to consider that *Catherine's income was in fact saved to pay for the children's education*.
>
> [94] We agree with the appellants that the learned judge had fallen into error when she disallowed this head of claim. The learned judge had ignored material evidence on how *support was shared and given between the first appellant and Catherine. SP1 had testified that he and Catherine had pooled both their resources including their salaries together to pay for the household expenses. The balance of the monies, which were largely Catherine's income was saved for their children's education locally and overseas. In other words, there was support from Catherine*.
>
> [95] Compensation for loss of support is compensation for the support given by the deceased, Catherine rendered in the form of money or money's worth. The typical support would be the food on the table, payment for accommodation, utilities, care, transport, comfort and even holidays. *Support for the children's education is yet another aspect or form of support that is claimable. That support may be spent immediately, paid in advance or put aside for use at a later date; it depends on how the claimants have arranged their affairs*. In computing the loss of support, s 7(3)(iv)(c)

of the Civil Law Act 1956 requires the deduction of the amount that the deceased or Catherine spent on herself, that sum being her living expenses. The appellants conceded that Catherine's living expenses was a sum of RM2,000 per month leaving the multiplicand at the sum of RM10,808.05. With a multiplier of four years, the total loss of support is RM518,786.40. To this sum, a tax deduction of 20% ought to be made. This sum is awarded together with interest at the rate of 5%pa from the date of judgment to the date of realisation.

[40] Based on *Vincent Manickam*'s case, counsel for the plaintiffs submitted that the court may assume that the deceased, even if she did not contribute to the monthly expenses, would have contributed to the pool of savings as she had two young children. Hence, counsel said that the court was entitled to utilise its discretion and make such an award for dependency as the court deems fit and proper, having regard to all the circumstances.

[41] On the other hand, counsel for the defendants took a firm and inflexible stand. According to counsel, no evidence was led during trial as to how much deceased had contributed to the family. She earned RM3,390 per month. The High Court just deducted 1/3 and gave 2/3 as loss of dependency. Hence, counsel said that loss of dependency was not proven and no amount should be allowed. He emphasised that the deceased's husband did not give any evidence that the deceased made any financial contribution and there was no other evidence. Counsel for the defendants submitted that equally the court can also infer that P1 who was earning amount RM20,000 per month, was shouldering the finances for the household ie he was financially supporting the family.

[42] We have examined *Vincent Manickam*'s case and our response on the Court of Appeal's conclusion or its interpretation of the words 'loss of support' (per s 7(3) of the CLA) is as follows.

[43] First, it is to be noted that in *Vincent Manickam*'s case, there was evidence that the plaintiff and his deceased spouse, Catherine, had pooled their income to pay for the household expenses and that the balance of the monies, which were largely Catherine's income was 'saved for their children's education locally and overseas'.

[44] Next, in the present case, there is no evidence whatsoever that P1 and the deceased had pooled their income and that the income of the deceased was saved for their children's future educational needs. If anything, the evidence suggested that it was P1 who was shouldering all the household expenses and the deceased did not contribute to the household expenses. Now, even assuming for a moment that the unused portion of the deceased's income after deducting 1/3 for her living expenses is to be regarded as monies 'saved' for the

future educational needs of the children, it is clear that this is at best, a future possible expense which was not incurred at the time of her death.

[45] Hence, the question is whether monies saved by a deceased, can be considered for purposes of a claim for loss of support, when these monies are meant or intended for a future use such as education of the children. In this regard, it is important not to lose sight of the fact that P1's income was around RM20,000 per month whilst the deceased earned around RM3,000 and there is no indication that P1 was reliant on the deceased's income to fund the education of the children in future.

[46] Clearly, the suggestion (by the plaintiffs in the appeals before us) that the court can infer that the monies were savings is misplaced. There is no room for inference and it all boils down to evidence. And here there is plainly no evidence to support the suggestion that the deceased's income was saved for the future education needs of the children.

[47] Indeed, there is no case law which supports the Court of Appeal's interpretation of s 7(3) of the CLA and as such, with respect, we doubt the correctness of the theory, as suggested by the Court of Appeal in *Vincent Manickam*'s case that unused or unutilised income of the deceased (even if it is proven that it was meant as savings) can fall within the ambit of 'loss of support' (per s 7(3) of the CLA).

[48] We take a contrary view. In our view, if the income of the deceased in whole or in part are not utilised to pay for the household or parts of educational needs and are unutilised and kept aside as 'savings' for a future use, then those unused monies may not be taken into account when computing loss of support under s 7(3) of the CLA. We would go so far as to say that if the dependents are unable to prove that they had a direct and immediate monetary benefit from the income of the deceased 'at the time of the death' (which is the critical date), then, even if the deceased may have kept aside his/her surplus income, that would not be within the definition of loss of support as that would be an invitation into the realm of surmise and speculation and uncertainty because the intention of the deceased vis a vis the saved or unutilised monies, (if he/she had lived) could well change or morph over time.

[49] Whilst on this point, we think that we should take the opportunity of stating for the benefit of the trial courts, particularly but not exclusively, the magistrates courts and sessions courts that the so-called 'modern method' of determining loss of dependency by taking off 1/3 from the net income of the deceased and treating the balance (2/3) as the 'surplus income' as loss of dependency is a flawed method, particularly when there are more than one family member who is earning and capable of supporting the dependents.

[50] This is accentuated if one family member (parent) is earning a substantial income, just like P1 in this case who was earning around RM20,000. A claim for loss of support is akin to a special damage claim and it must be proven by clear, convincing and compelling evidence. The mere say-so of a dependent or a surviving spouse or parent is hardly convincing evidence as it is prone to exaggeration and springs from a self-serving source. No doubt, it is a tedious task for a trial court, but it must be undertaken with extreme care and caution.

[51] The trial courts should not wear blinkers and cannot be actuated by any sympathy for the dependents, otherwise it will result in unjust enrichment because the court would end up awarding monetary compensation when there was in reality no loss of support. The courts must be astute and stoic in their approach to this issue and not be actuated by sympathy.

[52] In this regard, it is worth repeating what the Federal Court had said in *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1 (FC):

> It is trite that damages serve as compensation, not a reward, less still a punishment (see *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324). In assessing damages, the courts should not be motivated by sympathy and award fair compensation based on cogent evidence. The court should not descend into a domain of speculation.

[53] Thus, if the victim (deceased) was earning say RM24,000 per month and the court takes the so-called 'modern approach' and deducts 1/3, does this mean, without more, that the deceased was spending RM16,000 on household expenses for the upkeep of the dependents? The answer is quite obviously in the negative.

[54] It simply defies logic and common sense. Hence, the statement by Justice KC Vohrah in *Rebecca Mathew & Ors v Syarikat Kerjasama Serbaguna Gema Wong Siang Bhd & Anor* [1990] 1 MLJ 443 (HC) where he said, 'find the net income of the deceased and deduct from that a percentage representing the deceased's personal living expenses; the remained is the value of the dependency for the plaintiff', is not to be applied in all cases, particularly where there are others contributing to the household expenses and especially where the deceased was earning a substantial income.

[55] In this regard, we would venture to state that in a claim for loss of support, there is no assumption, presumption or inference to be made. The claim must be proven in the ordinary way.

[56] We find the following passages from the judgment of Evrol Mariette

Peters JC in the case of *Au Meng Kai v Gan See Sin (sebagai bapa yang sah dan penanggungan kepada Gan En Teck, simati, untuk diri sendiri) & Anor* [2021] MLJU 2300; [2021] CLJU 1933; [2021] MLRHU 1828 (HC) (as she then was — now judge of the Court of Appeal) to be quite relevant to the point which we made in the preceding paragraphs:

> Whether the plaintiffs had proved the loss of support suffered
>
> [23] The subsequent issue that arose was what was the actual loss of support suffered by the plaintiffs.
>
> [24] It is apt, at this juncture, to bear in mind that 'it is not enough to write down the particulars and throw them at the head of court, saying, 'This is what I have lost; I ask you to give me this damages': per Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177 cited in *Sum Kum v Devaki Nair & Anor* [1964] 3 MLJ 74; [1981] CLJU 76; [1981] 1 LNS 76.
>
> [25] It is a well-established principle that special damages, in contrast to general damages, has to be specifically pleaded and strictly proved: *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324; [1983] CLJ Rep 300. This was reiterated by Gunalan Muniandy JC (as he then was) in *Manivannan Nalatamby & Anor v Wong Siew Ling & Ors* [2014] CLJU 292; [2014] 1 LNS 292, where he had stated in the following passage:
>
> > Even though this item of claim is under general damages which is subject of assessment, it is a liquidated claim for a specified amount that has been quantified. As such, the quantum claimed must be strictly proved. Amongst others, it is essential to prove the deceased's income at the time of his accidental death. The appellants cited in support the Supreme Court case of *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 5 MLJ 233; [1994] 3 CLJ 792 where it was, inter alia, held '... Further in our opinion, *loss of support is for all practical purposes translated to financial loss sustained by the dependant*'. (Emphasis added.)
>
> [26] The measure of damages is the pecuniary loss suffered by the plaintiffs as a result of the death of their child. *The pecuniary loss is the actual benefit of which the plaintiffs have been deprived of*: *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 5 MLJ 233; [1994] 3 CLJ 792 and *Yap Ami & Anor v Tan Hui Pang* [1982] 2 MLJ 316 ; [1982] CLJ Rep 367.
>
> [27] It was crucial to bring to the forefront that 'support' in the context of s 7 of the Civil Law Act means the pecuniary provision which furnished a livelihood, a source of means of living, subsistence, sustenance, maintenance or living, and that the 'loss of support' *meant the pecuniary benefit lost, as a consequence of the death of the provider*. Reference on this point was made to *Muhamad Hashim (bapa Noor Azlan Muhamad (simati) bertindak bagi pihak tanggungan) v Teow Teik Chai & Anor* [1996] 4 MLJ 7; [1996] 1 CLJ 615; [1996] 2 AMR 1594.

[57] In the result, our decision on item 7 (loss of dependency) is as follows. In our view, there was no evidence before the High Court that the deceased had contributed RM2,230 per month towards household expenses.

[58] The High Court's approach of awarding loss of dependency based on the monthly salary of RM3,390 less 1/3 = RM2,230 is fundamentally flawed. It is trite that loss of dependency must be proven on a balance of probabilities by cogent, credible and compelling evidence to establish that the deceased had in fact contributed a certain sum towards the household expenses. That was not established in this case as a matter of evidence. We reject the suggestion made by counsel for the plaintiffs that we can choose fair and reasonable sum as loss of dependency. In the circumstances, we are of the view that loss of dependency was not proven. The defendant's appeal on this item succeeds and the appeal is allowed. The sum of RM176,280 is accordingly set aside.

Aggravated damages — Pleadings

[59] We turn now to the topic of aggravated damages. It is only appropriate that we preface this topic by referring to s 8 of the CLA which reads relevantly as follows:

> 8 Effect of death on certain causes of action
>
> ...
>
> (2) *Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person —*
>
> (a) *shall not include any exemplary damages*, any damages for bereavement made under subsection 7(3A), any damages for loss of expectation of life and any damages for loss of earnings in respect of any period after that person's death;
>
> ...
>
> (c) *where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included*. (Emphasis added.)

[60] In terms of the issue of pleadings in regard to a claim for aggravated damages, it is important to emphasise that it is fatal if aggravated damages are not specifically pleaded and particularised in the statement of claim.

[61] The rationale for this strict procedural pleading requirement was lucidly explained by Justice Andrew Phang JA in the case of *Noor Azlin bt Abdul Rahman & Anor v Changi General Hospital Pte Ltd* [2021] SCD 464; [2022] 1 SLR 689; [2021] SGCA 111 ('*Noor Azlin*'s case') where he said:

> [259] In our judgment, it follows inexorably from the above distinction that *aggravated and punitive damages constitute 'special damages' for the purpose of pleadings. Neither follow in the ordinary course and both are exceptional in character*. Let us explain.
>
> [260] Punitive damages are wholly anomalous and therefore awarded only

exceptionally. First, they are a 'response to conduct which is beyond the pale and therefore deserving of special condemnation' (see *ACB* at [176]). Such conduct is necessarily rare — it does not follow in the ordinary course.

Second, they are exceptional in nature because they represent a departure from the general rule that damages in tort are awarded to compensate a plaintiff for wrongs suffered and to place him back in the same position as if the tortious wrong had not been committed (see above at [58]). The law therefore does not and cannot presume that conduct giving rise to or arising in connection with a tort is 'outrageous' or deserving of 'punishment, deterrence, and condemnation'. Such conduct must be pleaded and proved to the satisfaction of the court. We therefore agree with the approach taken by the judge at [192] of the Judgment ([3] supra), as well as in cases such as *AKRO Group DMCC v Discovery Drilling Pte Ltd* [2019] 4 SLR 222 at [164]–[165] that punitive damages must be specifically pleaded and particularised.

[261] In a similar vein, *aggravated damages are awarded only when the plaintiff is able to show that there is 'contumelious or exceptional conduct or motive on the part of the defendant and that the plaintiff suffered an intangible loss, injury to personality or mental distress, as the case may be'* (see *Li Siu Lun* at [138], citing the High Court decision of *Tan Harry and another v Teo Chee Yeow Aloysius and another* [2004] 1 SLR(R) 513 ('Tan Harry') (affirmed by this court in *Teo Chee Yeow Aloysius and another v Tan Harry and another* [2004] 3 SLR(R) 588) at [82])). *Furthermore, aggravated damages are unique because they are awarded for the aggravation of injury by the manner in which the defendant committed the wrong or by his motive in doing so, either or both of which might have caused further injury to the plaintiff's dignity and pride* (see *ACB* at [156], citing *Freddie Koh* at [75]–[77] with approval). *Crucially, this occurs in circumstances where the normal measure of general compensatory damages, which is usually sufficient to compensate plaintiffs for their loss, is insufficient so as to require a further compensatory award, over and above an award of general compensatory damages. This enhanced hurt must therefore be proved specifically by the plaintiff to the satisfaction of the court.*

In short, there is nothing ordinary about aggravated damages, and nothing for the law to presume. It is for this reason that there is a long line of cases in support of the proposition that aggravated damages must be pleaded specifically and with particularity (see, for example, *Li Siu Lun* at [163] and *Tan Harry* at [83]). As succinctly put by the authors of *Bullen & Leake & Jacob's Singapore Precedents of Pleadings* (Jeffrey Pinsler gen ed) (Sweet & Maxwell, 2016) at para 25.08:

> In special circumstances, the court may grant additional damages as aggravated damages. The facts which 'aggravate' the plaintiff's loss must be pleaded, for example exception or contumelious conduct or motive, and malice. (Emphasis added.)

This same point was also made by the authors of *Singapore Civil Procedure* at para 18/12/13 as follows:

> The facts relied on to support a claim for aggravated damages should be specifically pleaded (*Perestrello e Companhia Limitada v United Paint Co Ltd* [1969] 1 WLR 570; [1969] 3 All ER 479, CA (Eng), *Rookes v Barnard* [1964] AC 1129; [1964] 1 All ER 367). Where the facts relied on do

A not support such a claim, the claim may be struck out (*AB v South West Water Services Ltd* [1993] QB 507; [1993] 2 WLR 507; [1993] 1 All ER 609, CA (Eng)). (Emphasis added.)

B **[62]** We agree with the decision of the Singapore Court of Appeal in *Noor Azlin*'s case and the correct position in so far as pleadings are concerned is that aggravated damages must be specifically pleaded, properly particularised and proven on a balance of probabilities.

C **[63]** In the circumstances, it follows that the decision of the High Court in *Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor* [2001] 6 MLJ 497; [2001] 4 CLJ 433 (HC) ('*Bohjaraj*'s case') which enunciated that aggravated damages are part of general damages and need not be pleaded, and other cases which have relied on *Bohjaraj*'s case or which took a similar approach on the pleadings point including the Court of Appeal's decision in *Hassnar bin MP Ebrahim @ Asainar v Sulaiman bin Pong & Ors* [2018] 1 MLJ 346; [2017] CLJU 1167 (CA) (endorsing *Bohjaraj*'s case on the pleading point) are with respect, wrong, and henceforth should not to be followed.

E **[64]** For completeness, we should also add that this court in *Lee Kok Chian v Cheok Lam Chuan and another appeal* [2025] MLJU 2273; [2025] CLJU 1818 (CA) had adopted the principle that was enunciated in *Noor Azlin*'s case and opined that aggravated damages must be pleaded and particularised in the statement of claim.

F *Aggravated damages — The law*

[65] The legal principle governing aggravated damages was established in *Rookes v Barnard* [1964] AC 1129; [1964] 1 All ER 367; [1964] 2 WLR 269; [1964] 1 Lloyd's Rep 28, where Lord Devlin held that *aggravated damages* may be awarded when *the manner in which the wrong was committed resulted in injury to the plaintiff's dignity, self-respect, or emotional well-being*. This is how Lord Devlin explained the basis for the award of aggravated damages (p 1221 AC):

H > Moreover, it is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account *the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride*.

I **[66]** Keeping in mind the salutary words of Lord Devlin, in the present context, it is only apt for us to refer to the recent decision by the Court of Appeal in *Dr Chandran*'s case where the principles on aggravated damages in professional medical negligence cases were carefully distilled and lucidly set out

by the learned Justice Wong Kian Kheong JCA, who said:

N(3). Aggravated damages (RM350,000)

69. Firstly, in *Dr Hari Krishnan*, at [2(ii)], [98] and [99], our Federal Court has recognised that the court may grant aggravated damages in professional medical negligence cases:

> [2] Appeal No 02(f)-21–03 of 2015 ('the doctors' appeal') was filed by Dr Hari and Dr Namazie. In the doctors' appeal, this court granted leave for the following two questions:
>
> ...
>
> (ii) Whether aggravating factors should be compensated for as general damages, therefore rendering a separate award of aggravated damages unnecessary, as decided by the English Court of Appeal in *Richardson v Howie* [2004] EWCA Civ 1127 and explained in Michael Jones' *Medical Negligence* (4th Ed, 2008), para 12–011.
>
> ...
>
> [98] Aggravated damages have in fact been awarded as a separate head of damages by Malaysian courts. In the recent decision of this court in *Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor* [2016] 4 MLJ 282; [2016] 6 CLJ 346, the High Court's award of aggravated damages was upheld ...
>
> [99] It can be seen from the above cases that aggravated damages can be and have been awarded as a separate head of damage in tort. For example, aggravated damages are frequently awarded in defamation cases for injury to a person's reputation. There is no reason to exclude this kind of damages from medical negligence cases, which involve real injury to a person's body. In the circumstances, we answer the second question in the negative. As such, the doctors' appeal on quantum is dismissed.

70. Secondly, contrary to Mr Felix Raj's submission, aggravated damages are to be distinguished from exemplary damages. Such a distinction had been explained by Zawawi Salleh JCA (as he then was) in the Court of Appeal case of *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784; [2017] CLJU 500, at [32] and [33] as follows:

> [32] Now, aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant.
>
> [33] The exemplary damages or punitive damages — the two terms now regarded as interchangeable — are additional damages awarded with reference to the conduct of the defendant, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. Exemplary damages may be awarded where the defendant has acted with

vindictiveness or malice, or where he has acted with a 'contumelious disregard' for the right to the plaintiff.

The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory, and the award may also have an important function in vindicating the rights of the plaintiff (see *Rookes v Barnard* [1964] 1 All ER 347; *A B v Southwest Water Services* [1993] All ER 609; *Broome v Cassell & Co* [1971] 2 Q B 354; and *Laksamana Realty Sdn Bhd v Goh Eng Hwa and another appeal* [2006] 1 MLJ 675).

Furthermore, according to s 8(2)(a) of the CLA, exemplary damages cannot be claimed in an estate/dependency suit. There is however nothing in ss 7 and 8 of the CLA which prevents the court from awarding aggravated damages in an estate/dependency suit.

71. Thirdly, with regard to the question of whether there should be any proportionality between the amounts of general damages and aggravated damages, the following judgment in *Sambaga Valli*, at [40] and [41], is relevant:

[40] So too in [UK]. In *Thompson v Commissioner of Police of Metropolis* [1997] 2 All ER 782, Lord Woolf observed:

> ... We do not think it is possible to indicate a precise arithmetical relationship between basic damages and aggravate damages because the circumstances will vary from case to case. In the ordinary way, however, we should not expect the aggravated damages to be as such as twice the basic damage except perhaps where, on the particular facts, the basic damage are modest.

[41] In the same vein, the Singapore Court of Appeal in *Koh Sin Chong Freddie v Chan Cheng Wah Enterprise* [2012] 4 SLR 129 stated at p 652:

> ... we are nonetheless of the view that there should be some semblance of proportionality between the quantum of damages and aggravated damages awarded ...; and ... Aggravated damages are meant to compensate for the aggravation of the injury; they are not an arbitrary top-up unrelated to the desire of the court to compensate the plaintiff for the aggravation

72. We express the following view regarding the court's discretionary power to award aggravated damages:

(1) firstly, the court can only exercise its discretion to grant aggravated damages when a defendant has been guilty of malicious, contumelious, offensive, outrageous and/or 'exceptional' behavior or conduct which had caused distress, anguish, misery, hurt and/or injury to the feelings of the plaintiff ('aggravating circumstances');

(2) even though an award of aggravated damages is a form of compensation to a plaintiff, in view of the requirement for the plaintiff to prove the existence of aggravating circumstances (so as to claim aggravated damages), the court should consider an award of aggravated damages separately from the court's assessment of special and general damages — please refer to *Dr Hari Krishnan*, at [99];

(3) if the court is satisfied of the existence of aggravating circumstances, the court

will then exercise its discretion to assess a just, appropriate and reasonable sum of aggravated damages ('quantum (aggravated damages)'). In deciding the quantum (aggravated damages), the court should take into account the following factors (which are not exhaustive):

(a) the nature and prevalence of the aggravating circumstances;

(b) the nature and extent of the distress, anguish, misery, hurt and/or injury to the feelings of the plaintiff;

(c) the court should ensure that a plaintiff is not unjustly enriched or overcompensated by the quantum (aggravated damages) and at the same time, the court should prevent a defendant from being financially ruined in an unjust manner (two considerations) — please refer to *Motordata Research Consortium Sdn Bhd v Ahmad Shahril bin Abdullah & Ors* [2017] MLJU 1187; [2017] CLJU 1142; [2017] 7 AMR 560, at [75(2)]. These two considerations are more important than any mathematical comparison between the quantum of aggravated damages and the total sum of general damages (as contended by the first defendant); and

(d) if the quantum (aggravated damages) —

(i) exceeds the total amount of general and special damages ('total sum (general/special damages)'); or

(ii) constitutes a high percentage of the total sum (general/special damages)

– the court should give reasons for the quantum (aggravated damages). Only by giving reasons for the quantum (aggravated damages), can the court be said to have exercised its discretion judicially in the assessment of the quantum (aggravated damages); and

(4) from the viewpoint of the stare decisis doctrine, the quantum (aggravated damages) decided in a particular case, is an exercise of the court's discretion based on the particular facts of the case. Hence, cases regarding the quantum (aggravated damages) do not constitute binding legal precedents.

73. In this case, we are more than satisfied of the existence of aggravating circumstances on the part of the first defendant (first defendant's exceptional conduct) which supported an award of RM350,000 as aggravated damages. The first defendant's exceptional conduct is as follows:

(1) the concealment (first defendant's guarantee letter request form) — please refer to the above sub-para 32(5)(b);

(2) the first defendant's misrepresentation (deceased's parents) which had induced the giving of an invalid PW1's consent (sinus surgery) — please refer to the above sub-para 32(5)(c);

(3) the embellishment (first defendant's notes) — please refer to the above sub-para 32(5)(a); and

(4) DW2's false expert evidence was given to bolster unlawfully the first defendant's defence against this suit — please refer to the above para 37.

74. The first defendant's exceptional conduct, in our view, would explain the fact that the amount of aggravated damages (RM350,000) constituted a high percentage (about 64.7%) of the total sum (general/special damages) of RM541,000.

75. We are satisfied that the sum of RM350,000 as aggravated damages:

(1) would not unjustly enrich or overcompensate the deceased's estate; or

(2) would not financially ruin the first defendant in an unjust manner.

76. Premised on the evidence and reasons stated in the above paras 73 to 75, we unhesitatingly uphold the award of aggravated damages (RM350,000) against the first defendant.

77. We find that the learned High Court judge had erroneously exercised his discretion in awarding aggravated damages (RM350,000) against the second defendant. This was because there were no aggravating circumstances on the part of the second defendant which could support, let alone justify, the award of aggravated damages (RM350,000) against the second defendant. On this ground alone, we set aside the award of aggravated damages (RM350,000) against the second defendant.

Particulars of aggravated damages

[67] The starting point is — what was the plaintiffs' pleaded case for aggravated damages? The *particulars of aggravated damages* as pleaded in para 25 (and sub-paragraphs thereunder) of the statement of claim are as follows:

The Plaintiffs claim aggravated damages and will rely on the following facts and matters in support of the claim for the same:

25.1. the 1st Plaintiff and his children had discovered the true events leading to the deceased's death only after a review of the medical records by his medico-legal advisers;

25.2. the Defendants and each of them had breached their duties of candour, good faith, and to act in the deceased's best interests by attempting to conceal their wrongdoings;

25.3. the Plaintiffs also claim aggravated damages for the indignity, discomfort and unnecessary pain and suffering caused by the wrongful conduct of the Defendants and each of them;

25.4. the Defendants and each of them refused to make voluntary pre-action disclosure of the medical records despite there being no legal bar to such disclosure;

25.5. when the Plaintiffs submitted a grievance to the Defendants in a letter dated 21 June 2019, in accordance with valid subsidiary legislation and the healthcare provider's duty of candour, the Defendants failed to act on the Plaintiffs' grievance within the time stipulated in the legislation, whether sufficiently or at all; and

25.6. by reason of the matters averred above, the Plaintiffs' pain and suffering have been aggravated.

Plaintiffs' submission at the trial

[68] However, the plaintiffs' (verbatim) submission for aggravated damages at the end of the trial was as follows:

98. The conduct of the Defendants had been appalling. Instead of showing compassion the Defendants had chosen to blame Suman, her husband and later Dr Amit.

99. In summary, the aggravating conduct of the Defendants are as listed below:

99.1. to have alleged contributory negligence against Suman and her husband for having discharged herself against medical advice (by signing an AOR form);

99.2. the 1st Defendant's own witness Dr Priscila candidly admitted that she could not support these allegations and that she disagreed with them;

99.3. despite not being able to produce the alleged AOR form signed by Suman, Dr Prashanth supported, without any remorse, the allegations of contributory negligence he had pleaded against Suman and her husband,

99.4. to have positively pleaded that Suman had signed an AOR form, despite knowing as early as two months after her death that they could not find any such document;

99.5. to have attempted to raise, surreptitiously, an unpleaded point that their consultant-on-call Dr Amit (who did not even come to see the patient) was the person at fault for Suman's death;

99.6. to have attempted to raise, again surreptitiously, that the phone call by Dr Prashanth to Dr Amit somehow amounted to a 'referral' and therefore Suman was no longer the Defendants' problem;

99.7. having hid behind the veil of 'privilege' when it came to the disclosure of the findings of the internal inquiry undertaken into the death, Dr Priscila chose rather conveniently to make a limited disclosure of the findings when giving evidence by saying that it was Dr Amit who was at fault;

99.8. by alleging that Dr Amit had requested Dr Prashanth to get Suman to sign the AOR form;

99.9. to have been unconscionable enough (which is unbefitting of healthcare providers who are supposed to belong to a noble profession) to attempt to shift the blame onto others, especially onto Suman and Dr Amit, both of whom were not before the Court to defend themselves;

99.10. if Dr Amit was truly at fault, it begs the question as to why the Defendants (who were aware as early as two months after Suman's death) did not plead such facts or bring a claim for contribution or an indemnity (third party proceedings) against him;

99.11. to have disregarded Suman's family members' request for an explanation as regards her death and for copies of her medical records and reports, which necessitated an application for pre-action discovery of the same;

99.12. to have failed to admit liability despite having no expert support; and

99.13. to have disputed each and every item of damages, thereby putting the Plaintiffs to the task of proving each item of loss and damage.

Memorandum of appeal (Appeal 1482)

[69] In their memorandum of appeal (Appeal 1482), the defendants relied on the following grounds to challenge the award of aggravated damages:

7. The Learned Judge has *erred in law and/or in fact in awarding aggravated damages in the sum of RM 700,000-00, which is excessive and not reasonable, merely because the Appellants/Defendants have acted unprofessionally*.

8. The learned Judge has erred in law and/or in fact in failing to consider in totality the overall pleadings, the documentary evidence and the testimonies of the witnesses during trial and the applicable principles of law.

9. The amount awarded by the learned Judge is manifestly excessive and not in accordance with the relevant principles of law concerning aggravated damages.

[70] The High Court's basis or justification for awarding aggravated damages may be gleaned from the following para [36](ii) of the judgment which reads as follows:

The plaintiffs submits the conduct of the defendants had been appalling. Instead of showing compassion, the defendants chose to blame Suman, her husband and Dr Amit. The defendants alleged contributory negligence against Suman and her husband for having discharged herself against medical advice by signing an AOR form). The AOR form was never in sight or tendered in court to prove the defendant's claim. The second defendant said he referred to Dr Amit about Suman's condition which later Dr Amit asked him to refer Suman to a nephrologist on call. Dr Amit was never call to confirmed this fact. The defendants just simply shift the guilt to Dr Amit.

The Federal Court in *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor appeal* [2018] 3 MLJ 281 held that an award of aggravated damages can be made in a medical negligence case where the conduct of the healthcare provider justifies such an award. The Federal Court upheld the decision of the High Court awarding RM1m as aggravated damages for the plaintiff who suffered blindness in one eye.

For this reason, this court is of the opinion that the plaintiff should be awarded an appropriate and reasonable sum for the conduct of the defendants that have acted unprofessionally that have caused the lives of a patient. The aggravated damages awarded to the plaintiff in this case is RM700,000

The arguments before us

[71] In the present case, the primary submission made by counsel for the defendants is that the Estate cannot claim aggravated damages as it is personal in nature and intended to compensate a 'living plaintiff'. Hence, counsel argued that there should be no award as the estate of the deceased cannot maintain a claim for aggravated damages for anything done or committed by the defendants after the death of the deceased which may qualify as aggravating circumstances or conduct.

[72] On the other hand, the plaintiffs, relying on several case law authorities argued for purposes of Appeal 1483, that the sum of RM700,000 should be enhanced to RM1m or at the very least, that RM700,000 be maintained. Counsel for the plaintiffs said that it not open to the defendants to challenge the plaintiffs' entitlement to aggravated damages because in Appeal 1482, the defendants only challenged the quantum of aggravated damages and not the liability aspect for aggravated damages. It was contended by the plaintiffs that the point about the estate not being entitled to claim aggravated damages in respect of the defendants' conduct after the death of the deceased was not pleaded or ventilated in the High Court. Additionally, it was argued that the plaintiffs were deprived of the opportunity of calling evidence to rebut this point and finally the High Court was not called upon to rule on this point. However, upon a careful reading of para 7 of the memorandum of appeal (Appeal 1482), it was to us clear that the defendants are disputing any liability for aggravated damages, apart from also contending (per para 9) that this amount is manifestly excessive. Hence, we rejected the plaintiffs' said objection.

[73] At any rate, this is squarely a legal question and no amount of evidence will alter or influence the outcome on this point. It is necessary at this juncture to mention that at para 21 (c)(ii) of the grounds of judgment in *Dr Chandran*'s case, the Court of Appeal had noted the contention of the appellants with regards to the award of aggravated damages in favour of the estate of a deceased person which was couched in the following words — 'the purpose of aggravated damages is to compensate the deceased personally (not the deceased's family) for any 'added distress' caused by an 'aggravating' conduct of the defendants'.

[74] However, this point was not addressed in the judgment of the Court of Appeal in *Dr Chandran*'s case. As such, we are now compelled to do so.

[75] Now, following the Court of Appeal case of *Sambagavalli* quoted in para [77] of *Dr Chandran*'s case, it is quite clear that 'aggravated damages are classified as a species of compensatory damages, which are awarded as

A additional compensation where there has been intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant'.

B **[76]** At para [72] of the Court of Appeal's decision in *Dr Chandran*'s case, it was accepted that the court may exercise its discretion to 'grant aggravated damages when a defendant has been guilty of malicious, contumelious, offensive, outrageous and/or 'exceptional' behaviour or conduct which had caused distress, anguish, misery, hurt and/or injury to the feelings of the plaintiff'.

C

[77] In this regard, it is perhaps apt for us to also refer to *Cassell & Co Ltd v Broome* [1972] AC 1027 (HL), where Lord Diplock said (p 1124) that aggravated damages are a form of 'Additional compensation for the injured feelings of the plaintiff *where his sense of injury resulting from the wrongful physical act is justifiably heightened by the manner in which or motive for which the defendant did it'*. (Emphasis added.)

D

[78] But, it is of critical importance that we should not lose sight of the cardinal principle of aggravated damages as enunciated in *Rookes v Barnard* [1964] AC 1129 that aggravated damages may be awarded *when the manner in which the wrong was committed resulted in injury* to the plaintiff's dignity, self-respect, or emotional well-being. The phrase 'the manner in which the wrong was committed' must surely be in reference to the tort, which in the present case is the issue of (medical) negligence levelled against D1 and D2.

E

F

[79] Thus, leaving aside for the moment the question of whether any aggravating circumstances have been proven in the present case, the important and imperative question is whether the award of aggravated damages is meant only to compensate the person (the victim of the tort) who, because of the aggravating conduct by the tortfeasor, has suffered distress, anguish, misery, hurt and/or injury to his/her feelings. In other words, if the victim is deceased, and the tortfeasor exhibits aggravating conduct after the death of the deceased (*whether before or during the litigation*), can aggravated damages be awarded because of the distress and anguish caused to the relatives of the deceased who now claim through the estate of the deceased?

G

H

[80] In all the previous dependency/estate claims, the courts appear to have gone on the basis, that since s 8(2) of the CLA had specifically excluded exemplary damages, thus it was open to the court to grant aggravated damages apparently because of the distress or agony caused to the relatives of the deceased. It is quite clear that in the present case, in reaching her conclusion to award aggravated damages, the judge had relied on the submissions that were made on behalf of the plaintiffs after trial.

I

[81] We find that the plaintiffs' (post trial) submissions bear no causal connection with the matters pleaded in para 25 of the statement of claim. Hence, on pleadings alone the claim for aggravated damages ought to have been rejected. At any rate, we find that there is no clear and convincing evidence of any high handed, oppressive, insulting, or contumelious behavior by the Hospital ('D2') or its doctors, which was perceived by the deceased and which may, or could have increased the pain and suffering of the deceased whilst she was treated at the Hospital.

[82] In this regard, it is important to emphasise that aggravated damages are meant to compensate a person for the mental pain and suffering over and above that which can be compensated for on general damages in the form of pain and suffering.

[83] It is extremely important to distinguish between D2's negligent acts or omissions and any high handed, or contumelious or high-handed conduct or behavior which could have increased the deceased's mental pain or caused mental distress. The two should not be conflated as seems to have been done in this case and as appears to be the trend in most of the medical negligence cases where aggravated damages are routinely being awarded without any proper appreciation as to what constitutes negligence, and what constitutes aggravating circumstances/factors.

[84] The next, and perhaps, the more important issue is whether the estate of a deceased can claim aggravated damages. The answer is: it depends.

[85] Thus, the estate of a deceased may pursue a claim for aggravated damages but only for any aggravating conduct whilst the deceased was alive and provided that the deceased was sentient and able to perceive the aggravating conduct.

[86] Hence, it is doubtful whether an unconscious patient, who is not sentient, would be able to perceive the aggravating conduct of the tortfeasor since there can be no reason to support that an unconscious patient will be distressed or suffer mental agony due to aggravating conduct of the medical personnel. Those who will be distressed will obviously be the family members or caregivers who will be the one witnessing the tortfeasor appalling conduct. But the question is whether they have an independent cause of action against the tortfeasor who is exhibiting aggravating conduct? The answer is no. At best, they would be secondary victims, who, as a matter of law do not have a cause of action against the tortfeasor (see discussion at para [91] below).

[87] Here, upon examining the record of appeal, we find nothing in the conduct of the defendants which qualifies as aggravating conduct. The

plaintiffs harped on the fact that when the deceased was brought in for the second time, the family members were asked why the deceased had discharged herself when she was in such a serious condition. The following testimonies of P1 and P2 were relied upon to justify the award of aggravated damages:

> Examination-in-chief of PW2
>
> Q: Please explain what happened when the late Madam Suman returned to the hospital.
>
> A: She was in the ambulance, and I was in the car. After parking the car they took her to the emergency. I came down to the emergency and found out where my late wife was. I rushed inside and she was on lying on the bed having difficulty breathing. She asked me for 'minyak angin'. I was outside of the emergency ward. Next thing, a few doctors, Dr Madhu and Dr Thamarai and they asked me what was going on. They asked me why I came so late and that I should have brought her in earlier. They asked me 'why you took her back?' I said the doctor in the emergency was the one who insisted she be discharged as it was just Urinary Tract Infection ('UTI').
>
> Cross-examination of PW3
>
> AS: But you will agree that your late sister was seen by a multidisciplinary team of doctors at that point in time?
>
> PW3: I'm not sure because at that point in time, everybody was just rushing in, rushing out, so I don't know who really attended to her. We were standing outside. There was a lot of confusion and a lot of blame because they kept telling us that you should have brought her in early. So I told the doctor she came at 4.00am, so they were quite shocked, 'Oh, then why you took her home?', so I said because you all discharged her. Then they all panicked and that's when they all started getting their act together'

[88] Counsel for the defendants said that this is a routine fact finding set of questions matter and is only to be expected, especially since the patient was in a critical condition. It is to be noted here and those who attended to the deceased did not include D2. And there is nothing in the conduct of D1 in terms of their response vis a vis the second admission which can be construed as negligent conduct. Quite clearly, the negligence had occurred only during the first admission.

[89] Thus, we agree with the position taken by the defendants on this point. In our view, the events that took place at the A&E when the deceased was admitted for the second time cannot qualify as aggravating conduct or circumstances as the questions as to why the family had delayed in bringing the deceased to the hospital is a routine and necessary question and was by no means a question or inquiry which could injure the feelings or pride of the deceased. The issue of the AOR form etc were all part of the defence strategy or litigation issue. It was part of the discussion or conversation when the deceased was brought in the second time. It is obvious enough that the doctors at the

A&E needed to know what had taken place and as such it was imperative that ask all relevant questions and if asking such probing questions at the A&E is to be regarded as aggravating conduct, then we would say that all reason, logic and common sense has taken flight.

[90] Consequently, we are compelled to reject the incident at the A&E (second admission) as supporting the claim for aggravated damages. Further, and in any event, this was not part of the particulars per para 25 of the statement of claim and yet further, was not the basis on which the judge had awarded aggravated damages (per para 36(ii) of the grounds of judgment).

[91] In so far as the relatives of the deceased experiencing distress and pain due to any alleged callous conduct of the defendants, they would only be secondary victims. In this regard, in *Paul and another v Royal Wolverhampton NHS Trust; Polmear and another and Royal Cornwall Hospitals NHS Trust; Purchase and Ahmed* [2024] UKSC 1, the Supreme Court of the United Kingdom confirmed that psychological harm to family members, even if due to medical negligence, is not generally recoverable — reinforcing the principle that emotional distress claims are for the living, not deceased estates. Hence, although a doctor/hospital may have behaved badly after the patient's death — in distressing or opaque ways — that misbehavior did not cause any distress to the deceased. Hence, no claim for aggravated damages can survive and the estate cannot step into the deceased's shoes to claim emotional harm the deceased no longer experienced.

[92] The plaintiffs before us also relied on the case of *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25; [2008] 1 AC 962; [2008] 2 WLR 975; [2008] 3 All ER 573 (HL). A man named Ashley (the deceased) had been shot and killed during a police raid on his home. The claimants were the estate, and dependants of the deceased. The dependents were also both named Ashley. The officer who shot the deceased mistakenly believed that the deceased was about to attack him. In reality, the deceased was in bed and unarmed. The claimants sued the Chief Constable for Sussex Police in several torts, including negligence and battery. While liability for negligence was admitted, the Chief Constable disputed the battery claim. He argued that officer who shot the deceased was acting in self-defence, and so had a defence to a battery claim.

[93] Nevertheless, the Court of Appeal permitted the battery claim to proceed to trial. The defendant appealed this decision to the House of Lords. One of the questions that arose was — since negligence had been admitted, was there any point in the battery claim proceeding to trial? The House of Lords dismissed the appeal, holding in favour of the claimants. The majority opined that the battery claim could vindicate rights, and so should be allowed to proceed. Hence, the ruling by the majority was that there can be value in a

claim proceeding to trial even if substantial damages will not be obtained. Thus, the claim was not to be prevented from proceeding to trial by reason of the fact that it could not result in the award of further compensatory damages and was being pursued in order to vindicate the claimants' contention that the police officer had unlawfully killed the deceased.

[94] The first point to note is that *Ashley* was a decision arising from an interlocutory application. The question of whether a claim for aggravated damages in these kinds of situations where death was instantaneous, could succeed, was not decided with finality. At any rate, for purposes of the present appeals it is significant to refer to the dissenting judgment of Lord Carswell who opined at para [80] as follows:

> 80. ... In my opinion the only function for damages of this kind is when there is no other remedy which will meet the case-there being perhaps no provable loss-except a nominal award of damages to establish formally the validity of the claim. It is a time-honoured way of establishing a point of principle or vindicating wounded feelings or character: *Salmond & Heuston on the Law of Torts*, 21st ed (1996), p 9.
>
> *In the present case the chief constable has admitted liability for negligence and has undertaken to pay the claimants damages, including any award for aggravated damages (though it is more than a little difficult to see how such damages can be in question, when it is very questionable whether the deceased was conscious and sentient for any significant period between the shooting and his death).* (Emphasis added.)
>
> As such, at paragraph [83] Lord Carswell stated, '83 For these reasons I would regard proceeding with the claim of assault and battery as an abuse of the process of the court. I would allow the chief constable's appeal and stay that claim ...'

[95] In our view, the case of *Ashley* does not stand as persuasive authority for the proposition that the estate of the deceased may claim aggravated damages for a tort committed where the tortious event resulted in instant death and where the deceased could not have perceived any pain or suffering or any loss of pride or dignity. The observation by Lord Carswell at para [80] is most illuminating. If the deceased is not sentient for any reason whatsoever, and aggravated damages are not claimable then it is all the more compelling that the estate may not claim for anything that took place after the death of the deceased. This topic is discussed in the paragraphs that follow.

Whether in the present case the estate can claim for aggravated damages?

[96] Hence to circle back to the factual situation here, the question arises is — assuming aggravating circumstances or behavior are displayed by a doctor (D1) or the Hospital (D2), after the death of the patient, say for example, by behaving badly or insensitively in terms of dealing with the family, and are not transparent and, they put up a defence or take oppressive or contumelious litigation strategies which are indefensible, or untenable — can the estate of the

deceased claim for aggravated damages? A

[97] The other important question is whether, the estate of a deceased, which is a legal personality which can sue and be sued, but is not a sentient being and therefore not able to perceive or feel any distress, inconvenience or humiliation etc (*which are key ingredients for aggravated damages*), can lawfully sue for aggravated damages? B

[98] Our approach to these questions is that, an estate cannot claim aggravated damages for mental distress because the deceased is no longer alive and unable to experience the harm or pain occasioned by the tortfeasor's aggravating conduct or behavior after the death of the deceased. In this regard, we accept that if there were any aggravating circumstances or behavior by the tortfeasor when the deceased was alive, then perhaps aggravated damages for the events that occurred during that limited period might (not necessarily must) support a claim for aggravated damages. C D

[99] In this regard, it is important not to lose sight of the fact that aggravated damages are meant to compensate for non-pecuniary injuries like emotional distress, humiliation, or indignity suffered by the living individual, and these damages cannot logically and legally survive the death of the deceased. E

[100] By definition, aggravated damages are a compensatory remedy for what is sometimes described as a worse-than-normal injury to feelings, exacerbated by the defendant's outrageous or oppressive or egregious behavior after the tortious act. Thus, we are of the view, there is no entitlement for an estate to recover emotional distress that the deceased would have felt, as those feelings ceased on death. F

[101] In our view, aggravated damages require a living claimant suffering from worsened emotional injury due to the defendant's conduct. It follows that once the person dies, that claim dies with them. The estate cannot claim aggravated damages for any conduct which may cause distress to those near and dear to the deceased, even if the tortfeasor behaved reprehensibly after death of the deceased. G H

[102] There is another dimension to this issue which we must deal with. There are two cases which were referred to by the parties, here it is necessary for us to deal with the decision of the Federal Court in *Koperal Zainal bin Mohd Ali & Ors v Selvi a/p Narayan (joint administrator and dependant of Chandran a/l Perumal, deceased) & Anor* [2021] 3 MLJ 365 ('*Korperal Zainal*'s case'). The other case is *Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals* [2018] 3 MLJ 184 ('Nurasmira'). I

[103] Before we deal with the decision of the Federal Court in *Korperal Zainal*'s case it is necessary to examine the decision of the High Court in *Selvi a/p Narayan & Anor (joint administrator for the estate and dependant of Chandran a/l Perumal, deceased) v Koperal Zainal bin Mohd Ali & Ors* [2017] 9 MLJ 300 where the High Court had awarded exemplary damages in the sum of RM 200,000 for public misfeasance and violation of constitutional rights of a detainee who died in custody, despite the statutory bar in s 8(2) of the Civil Law Act 1956 as regards an estate claim.

[104] That was a claim which arose out of the death of a detainee whilst in police custody. After setting out the events which had transpired prior to the death of the deceased, the High Court had concluded at para [175] as follows:

> [175] The death of the deceased in these circumstances is both regrettable and lamentable. By all accounts it was an avoidable death. It is just that neither DW3 nor the police personnel at IPD Dang Wangi bothered to take the necessary steps to send the deceased to hospital. If this is not behaviour which is reprehensible and unconstitutional, then I do not know what is.

[105] But it was contended by counsel for the plaintiffs before us that the High Court had taken into account the conduct of the police *after* the death of the deceased. Presumably, counsel was having in mind para [174] of the High Court's grounds of judgment which reads as:

> [174] However, *the witnesses for the defendants all feigned ignorance of the persons who were on patrol duty* and further no one from the CCTV control room was called to explain why no action was taken particularly when the images all showed that the deceased was in pain in the early hours of the morning on 10 September 2012. Taking all of the above conduct of the police into consideration, it is my view that there was a lackadaisical and indifferent attitude by the defendants especially DW3 ('D3'), DW2 ('D1') and DW4, *whose investigation into the death of the deceased was perfunctory to say the least*. It is clear that DW4 did not even satisfy himself that the Lock-Up Rules 1953 had been complied with. This is quite clearly a case which is replete with instances which are indicative of a violation of the deceased's constitutional right not to be deprived of his life, in circumstances where the defendants as the police authority, had deprived him of his liberty and thus assumed a heavy and onerous burden and had a special and extraordinary duty to ensure that during the time when the deceased was in their custody, he was given proper medical attention. (Emphasis added.)

[106] Counsel for the plaintiffs submitted that in the High Court the trial judge was outraged by the conduct of the defendants (the police) both before *and after the death of the detainee*, including the manner in which the death was investigated and the way the defendants presented their defence. Counsel also emphasised that the period of the detainee having suffered 'personal injury to his feelings' in, from the time he needed medical attention to the time he died, could not by itself have justified the quantum of the award made. The quantum

was also a reflection of the court's 'sheer abhorrence' against the misconduct of the defendants (which included conduct after the detainee's death). A

[107] In the present context, it was argued that there was unchallenged evidence of the aggravating conduct of the defendants in blaming the patient and her husband, whilst the patient was still alive. Both plaintiffs had testified that the various doctors at the Hospital had chided them and the patient (when the patient returned in an ill condition) for taking an 'AOR' discharge earlier. B

[108] In amplification, it was also argued that despite being aware of the 'non-existent' AOR discharge form shortly after the patient's death, the defendants falsely insisted that the patient had signed the said form and was to be blamed for her own death. Such allegations were also made against her husband and pursued throughout the trial. In addition, the defendants also blamed their own Dr Misra, a non-party, in a desperate attempt to defeat the claim. The willingness to blame the patient and their own doctor was conduct unbecoming of healthcare providers who had a higher legal, moral and ethical duty of honesty and compassion. Thus, it was submitted that the learned trial judge cannot be criticized now for having shown the High Court's 'sheer abhorrence' against such misconduct. C D E

[109] We turn now to *Nurasmira*. In that case, the Federal Court held that damages under s 7 was intended to be compensatory in nature. Further the distinction between ss 7 and 8 of the Civil Law Act was explained by the Federal Court in that case. F

[110] According to the Federal Court, an action under s 7 is an action by specified dependents for loss of support and the action under s 8 is for causes of action vested in the deceased prior to the death which he would have been able to pursue had he been alive. To be more specific, the Federal Court made it clear (per leave question No 3) that the action under s 8 must be predicated on *acts that occurred before the death of the deceased* ('leave question 3'). G

[111] Thus, to round off, in our view, having examined the evidence, although the deceased was in the Hospital for about 24 hours before she died, there is no compelling or any evidence that D2, or anyone from D1 had acted in a high handed, contumelious, oppressive or insulting manner such as to warrant the conclusion that he/they had caused mental distress or discomfort to the deceased, over and above the pain and suffering fact she had to endure due to D2's misdiagnosis (first admission) for which a separate award of general damages for pain and suffering had already been granted. H I

[112] Next, in so far as the conduct of D1/D2 after the death of the deceased, we are of the view that legally there can be no claim for aggravated

damages as the claimant is the estate of the deceased, albeit that the family members have suffered distress and mental agony due to the behavior of the defendants. This is because after the death of the deceased, no claim for aggravated damages can be made by the estate for events that occurred after the death of the deceased, as the estate is not a sentient being and is therefore incapable of perceiving or processing such aggravating conduct.

[113] If there was any improper conduct by the defendants in terms of their conduct of the litigation, then it is up to the court to register its disapproval by imposing such costs as are found to be necessary. Most certainly, the improper conduct of litigants in terms of the way the litigation is conducted is not a basis for aggravated damages.

[114] We therefore reject the notion that a claim for aggravated damages cannot be predicated on the conduct of the tortfeasor after the occurrence of the tortious event, including and up to the conduct at trial. Put in another way, the conduct of the tortfeasor, for purposes of aggravated damages must be the conduct which is associated with the facts giving rise to the tort. The legal principle governing aggravated damages was established in *Rookes v Barnard* [1964] AC 1129, where Lord Devlin held that aggravated damages may be awarded when *the manner in which the wrong was committed resulted in injury to the plaintiff's dignity, self-respect, or emotional well-being*.

Whether post-negligence conduct is relevant to aggravated damages?

[115] There is a final point which we feel needs to be ventilated and it has to do with the English Court of Appeal's statement (per Lord Woolf MR) in *Thompson v Commissioner of Police of the Metropolis; Hsu v Commissioner of Police of the Metropolis* [1997] 2 All ER 762 that 'Aggravating features can also include the way the litigation and trial are conducted'. The exact passage is at para [8] under the topic of 'The Guidance That Should Be Given' and reads as:

> (8) If the case is one in which aggravated damages are claimed and could be appropriately awarded, the nature of aggravated damages should be explained to the jury. Such damages can be awarded where there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award.
>
> Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a high-handed, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution. *Aggravating features can also include the way the litigation and trial are conducted.* (The aggravating features listed take account of the passages in the speech of Lord Reid in *Broome*'s case [1972] 1 All ER 801 at 836; [1972] AC 1027 at 1085 and Pearson LJ in *McCarey v Associated Newspapers Ltd (No 2)* [1964] 3 All ER 947 at

957; [1965] 2 QB 86 at 104–105.) (Emphasis added.)

[116] The question is — what was Lord Woolf referring to when he said 'the way the litigation and trial are conducted'? To understand the Court of Appeal's statement, it is necessary and indeed imperative to appreciate the factual and the contextual circumstances of that case.

[117] There were two appeals, involving one Ms Thompson and Mr Hu. Both had alleged, to put it bluntly, police brutality and high handedness when they were arrested and detained. These were not negligence cases. Rather they were intentional torts. The conduct of the police officers involved in both cases were said to be outrageous and totally inconsistent with their responsibilities.

[118] In Ms Thompson's case, senior police officers were involved in the case where she was prosecuted for assaulting a police officer. Of importance in the present context is the case for malicious prosecution that was subsequently brought by Ms Thompson. In the judgment of the Court of Appeal, the events that transpired in her case was said to be as follows:

> The events relating to the appeal by Miss Thompson start when she was lawfully arrested on 28 September 1991 at about 5am in connection with a drink and driving offence to which she pleaded guilty on 23 April 1992. She would have been released in the normal way on bail at about 7 am but instead she was granted bail by the magistrates' court at 9.18am. Matters went wrong in the case of Miss Thompson when it was decided to place her in a cell. Considerable and unnecessary force was used in doing this; some four or five officers were involved, two of whom were women officers. In the course of this part of her hair was pulled out and, in Miss Thompson's own words, 'it was like I was being abused physically and sexually by all of them'. As a result of this assault, in addition to the loss of hair, Miss Thompson was bruised and had pain in the back and hands.
>
> *The police's case, which was rejected by the jury, was that the force was only used after Miss Thompson had refused to be searched, that during the struggle she bit one of the officer's fingers causing it to bleed and assaulted other officers. As a result, she was charged with assault occasioning actual bodily harm*. On 23 April 1992 (seven months after the arrest) she was acquitted of the lesser offence which had been substituted of assaulting the officer in the execution of his duty. *In his powerful submissions on Miss Thompson's behalf Mr Emmerson stresses that this malicious prosecution involved the fabricating of a deliberately false case of the injury to the officer's finger and two officers of the rank of inspector together with other officers giving false evidence. Miss Thompson was subjected to the ordeal of having to listen to this false evidence being used against her*. A consequence of the false case was that on the day of her arrest Miss Thompson was taken to the magistrates' court in handcuffs. She was also deprived of her liberty during the criminal trial.

[119] Thus, it all started when Ms Thompson was first charged for assaulting a police officer and was acquitted ('first case'). She later sued the

police for malicious prosecution ('second case') and there is absolutely nothing in the judgment of the Court of Appeal to suggest that the police did anything (ie *the way the litigation or trial was conducted*) in the second case which qualified as aggravating conduct.

[120] Thus, the phrase 'the way the litigation and trial are conducted' was in reference to the first case, where the police had fabricated evidence that she had bitten the finger of a police officer and which evidence was rejected by the jury in the first case. In so far as the second case is concerned, it was a suit for malicious prosecution and any aggravating feature was confined to what the police did in trying to mount a prosecution (first case) against the accused (Ms Thompson) based on false evidence.

[121] Clearly, that is aggravating conduct by the police. But they were nevertheless entitled to defend themselves to the hilt in the second case and it cannot be that that the defence which they filed, or the theory which they sought to prove (on liability or quantum) in the second case can be a basis for aggravated damages.

[122] That would be most untenable and unjust as every defendant is entitled to defend his case to the hilt based on whatever facts or legal position (both substantive or procedural) that he deems appropriate and relevant in the circumstances. If the defendant takes any untenable or conspicuously unmaintainable position, then the remedy for the opposing side lies in the relevant summary procedures available under the Rules of Court 2012 (eg O 14, O 14A, O 18 r 19(1)(a) to (d), O 33 etc).

[123] Yet further, we take the view that if there is any conduct by a defendant which is oppressive or high-handed in the way the case was handled or conducted, then the remedy lies in the award of costs (*including substantial costs in a fit and proper case*) against the party which has misconducted itself (per O 59 of the Rules of Court 2012) to reflect the opprobrium of the court.

[124] Hence, in the context of medico-legal litigation, the fact that the defendant opposed pre-action discovery, or did not admit liability early enough, or mounted a palpably untenable defence or put forward a defence which was at odds with the opinion of the defendant's own expert, or where the defendant (whether before or during trial) declined to take responsibility for the medical mishap are not, in our view, aggravating circumstances.

[125] Indeed, a defendant may well be misguided in taking such a strategy but that is his choice, and he is entitled to take any factual, legal or procedural position/strategy that he choses and accept the consequence that his strategies

may fail, but that does not translate into an aggravating circumstance which warrants aggravated damages.

[126] Thus, to take a stark example, if a doctor testifies that he did inform the patient of the risks, which is denied by the patient or his family members, and the court disbelieves the doctor, does that mean that the claimant is entitled to aggravated damages? The answer is plain and obvious and is in the negative. The proper avenue where it is proven that there was 'litigation misconduct', if at all, is as we said earlier, to invite the court to impose an appropriate order of costs.

[127] Thus, if there was misconduct by the party, the court could exercise its discretion to impose costs on the offending party under O 59 r 8(b) of the Rules of Court 2012. Indeed, a party who is entitled to costs may even be deprived of cost if it is shown that there was misconduct or neglect on their part (see: O 59 r 5 of the Rules of Court 2012) and finally, where there is misconduct by the solicitor, then there is a specific provision allowing the court to impose cots personally on the solicitor (see: O 59 r 6 Rules of Court 2012). Hence, the provisions contained within O 59 of the Rules of Court 2012 is the remedy for the malady (litigation misconduct).

[128] In this regard, in the case of *Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd (Hong Hing Thai Enterprise Sdn Bhd, third party)* [2011] 4 MLJ 354 (HC), the High Court had repudiated a claim for aggravated damages in respect of matters which were brought up at trial. According to the High Court, the aggravating conduct must have occurred at the same time as the occurrence of the wrongful acts.

[129] This is seen in the following passage of the High Court's judgment.

> [50] From the evidence adduced before this court and the grounds relied on by the plaintiff in submission as stated above that briefly, PW1 had urged DW1 to cease piling work but it was not entertained; PW1's consultant engineer had recommended the method of reducing vibration but was not adopted; the defendant had failed to comply with MPPP's stop work order; *DW1 cast aspersions on the integrity of the plaintiff saying that the plaintiff wanted the defendant to pay for their costs of conservation, the plaintiff contended that their feelings and pride or dignity had been injured*.
>
> *The plaintiff also relied on PW5's evidence that she and the shareholders of the plaintiff were helpless and overwhelmed with fear of the mansion collapsing or suffering irreversible damages*. This court nevertheless finds absolutely no evidence from either PW1 or PW5, the two directors of the plaintiff that they felt hurt and their pride or dignity was injured by the failure of the defendant to heed their request to cease piling, to adopt their consultant engineer's recommended method of reducing vibrations or to follow the MPPP's stop work orders. *The aspersions cast by DW1*

were words said in court on cross-examination and they were not utterances or acts said and done at the material time which had injured the dignity or pride of the plaintiff. The injury to the feelings and dignity must be at the time of the occurrence of the wrongful acts and similarly for words said. Hence these aspersions which came to light only during trial cannot be the ground to substantial (sic) the claim for aggravated damages.

On PW5's evidence that she and all the shareholders of the plaintiff were helpless and overwhelmed with fear for the mansion as the piling works continued, I am more inclined to find that these are the natural feelings that follow from the defendant's neglect to heed their calls. The fear and frustration are natural when someone refuses to accede to the injured party's request and persists on an act which goes to the breach of a duty of care. *The injury to the feelings and dignity must be more than the natural feeling that follows an event*.

In *Rowlands v Chief Constable of Merseyside Police*, Mrs Rowlands had complained to the police of a persistently noisy party opposite her home and get into a row with one of the police officers who had come to try to sort out the situation. She was arrested, handcuffed in front of her children, and taken to a police car, and when she asked to have the handcuffs loosened because they were causing excruciating pain, the police officer deliberately tugged them, increasing the pain. After being detained for 1 1/2 hours, she was charged with assaulting a constable in the course of his duty but she was acquitted.

In her suit for assault, false imprisonment and malicious prosecution she was awarded, inter alia, aggravated damages. Upon appeal, the Court of Appeal found aggravated damages awarded to be appropriate given the amount of humiliation and distress caused as well as the willingness of the police to give false evidence against her. It was also because Mrs Rowland's compensatory damages included an amount for psychological injury. The intention to injure the feelings and dignity is found to be expressed or could be reasonably inferred.

Each case, of course, will depend on its own facts. In the present case, defendant was persistent in the piling works because DW1 held the view that the vibrations from the piling works would not cause damages to the neighbouring buildings and secondly, defendant had a deadline to complete the extension of the hotel to cater for the 1998 Commonwealth Games.

The defendant may be adamant in pursuing the piling works to build the hotel extension but I do not find that their act to continue with the system of piling is calculated to injure the feelings and dignity of the plaintiff nor did the plaintiff hold the view that their feelings and dignity had been injured; otherwise, they would have or ought to have so pleaded.

[130] In the present case, in seeking to fortify their argument that the litigation conduct of the tortfeasor is relevant for aggravated damages, the plaintiffs relied on the decision of the Irish Court of Appeal in *Fiona Conway v Irish National Teachers Organisation and others* [1991] 2 IR 305.

[131] In *Conway*, the Irish Court of Appeal had posited that the conduct of the tortfeasor up to and including the trial of the action is relevant for purposes

of determining the quantum of aggravated damages. The facts of that case were as follows. During an industrial dispute at the school where the plaintiff was a pupil, the defendant union issued a directive to teachers in neighbouring schools not to accept pupils from the plaintiff's school. This led to a disruption of approximately six months in the plaintiff's primary education, adversely affecting her future educational prospects and hence her potential income. The plaintiff was one of a number of children that instituted proceedings for conspiracy to deprive them of their constitutional rights. Liability was established at an earlier hearing; the present case was concerned with the assessment of damages. The Irish High Court awarded the plaintiff £11,500, including £1,500 as exemplary damages. The defendants appealed.

[132] The following passages from the judgment of Finlay CJ (p 317 of the judgment) was the focus of the submissions before us:

> In respect of damages in tort or for breach of a constitutional right, three headings of damages in Irish law are, in my view, potentially relevant to any particular case. These are:
>
> 1. Ordinary compensatory damages being sums calculated to recompense a wrong to a plaintiff for physical injury, mental distress, anxiety, deprivation or inconvenience, or other harmful effects of a wrongful act, and/or for monies lost or to be lost and/or expenses incurred or to be incurred by reason of the commission of the wrongful act.
>
> 2. Aggravated damages, being compensatory damages, increased by reason of:
>
> (a) the manner in which the wrong is committed involving such elements as oppressiveness, arrogance or outrage, or
>
> (b) the conduct of the wrongdoer after the commission of the wrong, such as a refusal to apologise or to ameliorate the harm done or the making of threats to repeat the wrong, or
>
> (c) *conduct of the wrongdoer and/or his representatives in the defence of the claim of the wronged plaintiff up to and including the trial of the action*.
>
> 3. Such a list of the circumstances which may aggravate compensatory damages until they can properly be classified as aggravated damages is not intended to be in any way finite or complete. Furthermore, the circumstances which may properly form an aggravating feature in the measurement of compensatory damages must in many instances be in part recognition of the added hurt or insult to a plaintiff who has been wronged and in part also a recognition of the cavalier or outrageous conduct of the Defendant.
>
> 4. Punitive or exemplary damages arising from the nature of the wrong which has been committed and/or the manner of its commission which are intended to mark the Court's particular disapproval of the defendant's

A conduct in all the circumstances of the case and its decision that it should publicly be seen to have punished the defendant for such conduct by awarding such damages, quite apart from its obligation where it may exist in the same case to compensate the plaintiff for the damage which he or she has suffered, I purposely used the above phrase 'punitive' or
B 'exemplary' damages because I am forced to the conclusion that notwithstanding relatively cogent reasons to the contrary, in our law punitive and exemplary damages must be recognised as constituting the same element.

C **[133]** The decision of the Irish Court of Appeal appears to have influenced the development and jurisprudence on aggravated damages in that jurisdiction. In this regard, in his article *The Law Relating to Aggravated Damages* [2020] Irish Judicial Studies Journal Vol 4(2) the author, David Culleton, described the importance of *Conway*'s case in the following words:

D Almost thirty years later, *Conway v Irish National Teachers Organisation* remains the seminal 'go to' authority on aggravated damages in Irish law. It was through this judgment that aggravated damages were developed past a theoretical concept and into a genuine bona fide category of compensatory damages which Irish judges have regard to when assessing claims. Judicial development of the law on aggravated
E damages post-*Conway* was initially quite restrained. However, after the Supreme Court decision in *Philp v Ryan* confirmed that such damages could be awarded within negligence claims, the application of aggravated damages has been confirmed in many different areas of tort law. Over the past fifteen years, the courts have shown an increased willingness to consider awarding aggravated damages

F **[134]** It is important to emphasise that *Conway* was a case where the court had awarded exemplary damages. Hence, the discussion on aggravated damages was obiter. The suggestion that the conduct of the defendant right up to the trial and the failure to render an early apology as being part of
G aggravating circumstances does not sit well with the concept of aggravated damages as envisaged by Lord Devlin. Having said that, we acknowledge that the concept of aggravated damages being predicated on the conduct of parties during a trial is not part of a recent judicial trend. It has happened in the past.

H **[135]** In *Dato' Abdullah Hishan bin Haji Mohd Hashim v Sharma Kumari Shukla (No 3)* [1999] 6 MLJ 589 (HC) the High Court awarded aggravated damages for the way the trial was conducted or more specifically, the way the cross-examination was conducted. This is how the High Court justified the grant of aggravated damages in that case (see pp 605–606 (MLJ)):

I Aggravated damages

Under this head the plaintiff is entitled to *damages* if he can show that the conduct of the defendant was so obnoxious as to warrant an award.

The plaintiff was *subjected to humiliating and insensitive questions which were never*

substantiated. For example it was put to the plaintiff that no human being would stoop to his level by making false, baseless and fabricated allegations of sexual relations with the defendant. When it was put to the plaintiff the court must assume that positive evidence would be led to prove the matters put (see article by Mahadev Shankar J, *Putting and Suggesting in Cross-Examination* [1984] 1 MLJ xi). Again it was put 'my instructions are the allegations are a total lie'. It was further put 'You are an incorrigible liar'.

It was clear to me that whilst the defendant put the plaintiff through the indignity of being subjected to disparaging and contumelious questions she knew very well that she would escape the pain and anguish of such similar possible treatment. This strategy was calculated to cost the plaintiff, bestowed with the title of a Datukship by the Sultan of Pahang, the maximum harm with the maximum publicity since this case was covered by both, all the local, and some foreign media. Further allegations were made that the plaintiff assaulted his maid. No evidence was led to establish this notwithstanding an undertaking given that such allegations would be proven. The maid could have been subpoenaed or the allegation proven in the manner best known to the defendant. Even to the very end the defendant did not let up. Notwithstanding the fact that she did not take the witness stand, she accused the plaintiff of being shameless and indecent. By her refusal to testify the defendant ought to have known that her case had fallen like a deck of cards.

Considering the fact that the plaintiff was subjected to prolonged and lengthy cross-examination for more than 14 days without let up by two experienced counsel on matters that remained unrebutted and considering the callous manner of such questioning and by putting suggestions which the defendant knew she could not establish, I am more than satisfied that the plaintiff has established a case for aggravated damages. Having considered all matters I award the plaintiff the sum of RM500,000 as *aggravated damages*.

[136] But it is necessary to mention here that this part of the High Court's decision in *Dato' Abdullah Hishan*'s case was *criticised* (*correctly in our view*) by the learned authors of the well-known book, *Civil Remedies* (2nd Ed) where they opined at para 4.174:

[4.174] In *Dato' Abdullah Hishan bin Haji Mohd Hashim v Sharma Kumari Shukla (No 3),* which was discussed earlier, the court also awarded RM500,000 to the plaintiff as aggravated damages in addition to a separate sum as exemplary damages. In arriving at this decision, the court took into consideration that during the trial, the plaintiff was subjected to prolonged and lengthy cross-examination for more than two weeks on humiliating and sensitive questions which were ultimately not substantiated. *This appears to be somewhat at odds with the principle stated* in *Rookes v Barnard*, *which focused on the manner in which the defendant's breach was carried out rather than on the behaviour of the defendant's counsel during the trial of the action*.

[137] Having regard to the matters discussed above, we are impelled to the view that the conduct of the tortfeasor after the commission of the tort does not have a bearing on aggravated damages and that the remedy for such subsequent conduct or misconduct (*including perhaps litigation misbehavior or*

A *oppressiveness etc*) lies in the award of substantial costs (as discussed above).

[138] To sum up, our view on aggravated damages is that:

(a) in terms of pleadings, it is imperative and mandatory that the claim for aggravated damages be expressly pleaded and properly particularized. The pleading must state the facts and circumstances relied upon where the plaintiff asserts that his/her dignity/pride/feelings have been injured;

(b) the injury to the pride, feelings or dignity must have occurred at the same time as the occurrence of the tort. Thus, events occurring after the occurrence of the tort, including pre-litigation conduct or conduct during litigation are not aggravating circumstances;

(c) the estate of a deceased may sue for aggravated damages but only for events which occurred prior to the death of the deceased and provided that the deceased was conscious/sentient and could feel or perceive the alleged aggravating conduct of the tortfeasor. Hence, the estate of a deceased person has no standing to sue for aggravated damages based on events or the tortfeasor's conduct which occurred after the death of the deceased;

(d) the negligent acts or omission of a tortfeasor must not be conflated with aggravating conduct, albeit, that the latter must be contemporaneous with the negligent act or omission. The conduct of the tortfeasor in the aftermath is irrelevant; and

(e) the manner in which a defendant (tortfeasor) conducts his defence or pursues his litigation strategy cannot form the basis for aggravated damages. Rather, such abusive conduct must be dealt with within the confines of the Rules of Court 2012 and the court's inherent jurisdiction.

[139] Before we conclude, we think that since aggravated damages have almost become the norm in medical negligence cases in Malaysia, there needs to be a clear and coherent statement of legal principle by the Federal Court as to whether, and in what circumstances if at all, aggravated damages should be permitted in medical negligence cases. For our part, we think that the courts should be slow to award aggravated damages in medical negligence cases. At any rate, there is in our view, an imperative need for this issue to be revisited and ventilated in the Federal Court, especially since we note that an important and relevant case such as *Kralj and another v McGrath and another* [1986] 1 All ER 54 per Justice Woolf J (as he then was), was not considered by the Federal Court in *Dr Hari Krishnan*'s case. It is significant that in *Kralj v McGrath* Justice Woolf had opined that aggravated damages are generally inappropriate in medical negligence cases. According to Justice Woolf, a patient's emotional distress and suffering, albeit intensified by the behaviour of the tortfeasor and circumstances of the negligent treatment, should be reflected in a higher award

of regular compensatory damages. In that case, the patient suffered physical and psychological harm during a negligent twin delivery. The defendant/doctor, manually rotated one of the babies inside her womb without anaesthesia and caused the patient to suffer extreme pain. The second twin was delivered but died shortly after. The defendant/doctor admitted liability for negligence and the case proceeded to assessment of damages. The judge described the doctor's treatment of Mrs Kralj as 'horrific' and 'completely unacceptable'.

[140] Despite negligence being found against the doctor, the High Court refused to award aggravated damages because the case was one of negligence. The plaintiff sought damages to compensate for her physical injuries, psychological trauma, nervous shock, and emotional distress, which were prolonged by the ordeal. Justice Woolf ruled that aggravated damages should not be awarded despite the fact that the circumstances of the negligent act were distressing. The judgment focussed on the compensatory rather than punitive role of damages in negligence cases. This is how the learned judge explained it (at p 61):

> It is my view that *it would be wholly inappropriate to introduce into claims of this sort, for breach of contract and negligence, the concept of aggravated damages*. If it were to apply in this situation of a doctor not treating a patient in accordance with his duty, whether under contract or in tort, then I would consider that it must apply in other situations where a person is under a duty to exercise care. It would be difficult to see why it could not even extend to cases where damages are brought for personal injuries in respect of driving. If the principle is right, a higher award of damages would be appropriate in a case of reckless driving which caused injury than would be appropriate in cases where careless driving caused identical injuries. Such a result seems to me to be wholly inconsistent with the general approach to damages in this area, which is to compensate the plaintiff for the loss that she has actually suffered, so far as it is possible to do so, by the award of monetary compensation and not to treat those damages as being a matter which reflects the degree of negligence or breach of duty of the defendant ...

[141] The other case that is of relevance and importance which was also not considered by the Federal Court in *Dr Hari Krishnan*'s case is the decision of the English Court of Appeal in *AB v South West Water Services Ltd* [1993] QB 507. In that case, a vast quantity of aluminium sulphate was accidentally introduced into the drinking water system at a water treatment works operated by a water authority. The plaintiffs, some 180 of the authority's customers, brought actions against the defendants, the authority's successor under the Water Act 1989, alleging, inter alia, nuisance, negligence and breach of statutory duty and claiming compensation in respect of injuries sustained as a result of drinking contaminated water. They claimed, inter alia, aggravated damages. The Court of Appeal approved the High Court's decision in *Kralj v McGrath* and struck out the claimants' claims for aggravated damages which

were pleaded on the basis of the claimants' indignation at the defendant's tortious conduct in a claim founded on public nuisance (so a non-intentional tort). The Court of Appeal ruled that while the plaintiffs were entitled to recover the ordinary measure of compensatory damages for all they had suffered as a direct result of the authority's breach of duty, their feelings of indignation, which were common to many plaintiff litigants, could not be characterised as pain and suffering and could not attract an award of aggravated damages; and that, accordingly, the claim for aggravated damages would also be struck out.

[142] In the circumstances, and in so far as the appeals on aggravated damages are concerned, for the several reasons as stated and discussed in paras [59] to [138], we are constrained to allow the defendants' appeal vis a vis aggravated damages and the order of the High Court which granted RM700,000 as aggravated damages is set aside. It follows that the plaintiffs' appeal which seeks an enhancement of aggravated damages, is therefore untenable and is hereby dismissed.

Trial costs

[143] Next, as for item 11, being the costs of RM10,000 awarded to the plaintiffs upon the conclusion of the case, it was submitted for the plaintiffs that this was grossly inadequate. Counsel said that the trial took two days and the plaintiffs called one medical expert whilst P1 and P2 had testified on the factual matters of the claim. And for the defendants, a representation of D1 testified on the second day followed by D2.

[144] Hence, given the issues which were ventilated at trial, counsel for the plaintiffs said that costs were in the region of RM250,000. On the other hand, counsel for the defendants said that RM30,000 would be a fair and reasonable sum.

[145] In our view, the sum of RM10,000 as trial costs was wholly inadequate. Clearly, the High Court had grossly underestimated and undervalued the work done which was necessary, inter alia, to marshal all the facts and to successfully establish primary liability on D2 and vicarious liability on D1 for the negligence of D2 which resulted in the death of the deceased.

[146] In all the circumstances, given that the trial took just two days, we think that a sum of RM75,000 would be fair and reasonable as trial costs payable to the plaintiffs.

Interest

[147] The final item is the interest of 8%pa awarded on pre-trial damages, general damages and aggravated damages from the date of service of writ (3 June 2022) to the date of judgment (15 August 2023). In this regard, counsel for the plaintiffs said he accepts 5%pa in lieu of 8%. Hence, the defendant's appeal is allowed and interest of 8%pa is reduced to 5%pa.

[148] The decision of this court on the individual items in dispute in the appeals are as tabulated below:

Item 1 (special damages):	The defendants' appeal is allowed and the sum of RM49,601.50 is reduced to RM33,000.
Item 2 (funeral/memorial services expenses — RM15,000):	The defendant's appeal is dismissed and the sum of RM15,000 is maintained.
Item 3 (cost of obtaining medical records via pre-action discovery):	The defendants' appeal is allowed and the sum of RM10,000 awarded by the High Court is set aside.
Item 4 (RM12,354.12) (cost of obtaining letters of administration):	The defendants' appeal is dismissed and the sum of RM12,354.12 is maintained.
Item 5 (additional salary for a maid. Not awarded by the High Court):	The plaintiffs' appeal is dismissed.
Item 6 (pain and suffering and loss of amenities) (RM100,000):	The defendants' appeal is allowed and the sum of RM100,000 is reduced to RM50,000.
Item 7 (dependency claim) (RM176,280):	The defendants' appeal is allowed and RM RM176,280 is set aside.
Item 8	Appeal is withdrawn
Item 9	Appeal is withdrawn
Item 10 (aggravated damages) (RM700,000 was awarded).	The defendants' appeal is allowed and the sum of RM700,000 is set aside.
Item 11 (trial cost) (RM10,000 was awarded):	The plaintiffs' appeal is allowed and the sum of RM10,000 is set-aside and substituted with trial costs of RM75,000.
Item 12 (rate of interest)	The defendants' appeal is allowed and the rate of interest is varied from 8%pa to 5%pa calculated from the date of service of writ (3 June 2022) to the date of judgment (15 August 2023).
Costs of the appeals	We make no order as to costs for both appeals.

The order	Since both appeals were heard together, we direct that a single order be taken out in respect of both appeals.

[149] We hereby acknowledge that in reaching our decision, we have been immensely assisted by counsel. We therefore thank counsel for their remarkable research, erudite submissions and lucid elucidation of the several issues which were ventilated before this court.

Award for pain and suffering and loss of amenities of life reduced to RM50,000; awards for loss of support and for aggravated damages set aside; and trial costs award increased to RM75,000.

Reported by Ashok Kumar